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Supreme Court, U.S.
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In The Supreme Court of the United States

GARY S. WHALEY

Petitioner(s)

v.

STATE OF CALIFORNIA
EMPLOYMENT DEVELOPMENT DEPARTMENT

Respondent(s)

On Petition For Writ Of Certiorari
To the Court of Appeal
Division One
State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the California Courts are improperly applying the McDonnell Douglas v. Green precedence in review of racial discrimination and retaliation complaints in California.

Whether Californians are being deprived of their Fourteenth Amendment rights to include due process of law and equal protection under the law because of the improper application of McDonnell Douglas v. Green precedence.

Rule 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or non-wholly owned subsidiaries.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows: none

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.................................... i
RULE 29.6 STATEMENT.................................... ii
LIST OF PARTIES.................................... iii
TABLE OF CONTENTS.................................... v
INDEX TO APPENDICES.................................... vi
JURISDICTION.................................... 1
TABLE OF AUTHORITIES.................................... 2
OPINIONS BELOW.................................... 3
CONSTITUTIONAL
AND STATUTORY PROVISIONS INVOLVED.......... 4
STATEMENT.................................... 7
REASONS FOR GRANTING THE PETITION.......... 15
CONCLUSION.................................... 17

INDEX TO APPENDICES

Appendix A, ...Page 3a

Court of Appeal, Fourth appellate District-Division One-State of California, Highest Court to review matter-Affirmed lower Court-opinion was ruled not to be published

Appendix B, ...Page 57a

San Diego Superior Court, Ruling for Case GIC850412-Summary Judgment in favor of Respondent, Plaintiff is denied a trial.

Appendix C, ...Page 73a

California State Personnel Board Administrative Hearing-Found illegal Discrimination, Disparate impact theory, Respondent also successfully argues that disparate treatment theory should not be heard administratively.

Appendix D, ...Page 97a

California Supreme Court Petition- State of California, denied review

Appendix E, ...Page 101a

Petition to fourth appellate Court for rehearing, Division One, State of California, Denied petition for rehearing.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1253 (a) and 1257(a)

[X] For cases from state Courts.

The date on which the highest state Court decided my case was September 21, 2007. A copy of that decision appears at Appendix "A."

[X] A timely petition for rehearing in the Fourth Appellate Court was thereafter denied on the following date: October 15, 2007, and a copy of the order denying rehearing appears in Appendix "E."

[X] A timely petition for review by the Supreme Court of the State of California was thereafter denied on the following date: December 12, 2007 and a copy of the order denying rehearing appears in Appendix "D."

[X} As a matter of note: A timely petition for review by the Supreme Court of the United States was delivered timely and in good faith on March 11, 2008. The corrected petition shall be mailed timely within 60 days of the Clerk of The Court's letter requesting certain corrections dated March 18, 2008.

TABLE OF AUTHORITIES

Cases:

McDonnell Douglas v. Green

****

Constitutional and Statutory Provisions:

Title VII of the Civil Acts Right of 1964 (as amended)
Fourteenth Amendment to the US constitution
FEHA California Government Code 12940(h)

****

Other Authorities

OPINIONS BELOW

IN THE
SUPREME COURT OF THE UNITED STATES
PETITTION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below

[X] For cases from state Courts

The opinion of the highest state Court to review the merits appears at Appendix "A" to the petition and is

[ ] reported at __________________________; or,
[ ] has been designated for publication but yet reported; or,
[X] is unpublished.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Acts Right of 1964 (as amended)
FEHA California Government Code 12940(h)
Fourteenth Amendment to the U.S. Constitution

Title VII of the Civil Acts Right of 1964 (as amended)

Section 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his/her employees or applicants for employment, for an employment agency, or joint labor-

(b) management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discrimination against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. prohibited preference, limitation, specification, or discrimination; occupational qualification exception

CALIFORNIA CODES GOVERNMENT CODE **SECTION** 12940-12951

12940. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.
(h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"No state shall... deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Appellant, a Caucasian male, began working as a part time, permanent intermittent Employment Program Representative ("EPR") for Respondent EDD in November, 2000. (JA 599). Although he desired to become a permanent full time employee no positions were available for him. He continued to work in the part time position waiting for a full time position to open.

In September, 2002 Respondent EDD and the Union representing EPR"S, of which Plaintiff was a member, entered into an agreement to convert a limited number of EPR'S from part time to full time provided they met all of the requirements of the full time position which included the employer applying a foreign language proficiency (JA 229). Since Appellant only spoke English he was not converted while twelve other employees, six who spoke Spanish and six who spoke Tagalog, working in the same office as Appellant were converted from part time to full time. (JA 205-208). Appellant, having waited two years and unaware of a legitimate business reason for the foreign language requirement, objected to being excluded from the conversion to full time and filed a race discrimination complaint with the State Personnel Board ("SPB") challenging the language requirements on May 12, 2003. (JA 205-209).

Although the initial complaint filed with the State Personnel Board alleged both disparate treatment and disparate impact, the hearing conducted by the Administrative Law Judge in January, 2004 found only disparate impact; the employer argued not to hear disparate treatment. (JA 202). The Judge, in his Proposed Decision, found that Appellant was the victim of discrimination under the disparate impact theory. (JA 202). As required by the rules, the State Personnel Board then reviewed the judge's proposed decision and issued a Board Decision on January 11, 2005 in favor of Appellant, finding that there was no legitimate business reason for the foreign language requirements and that Appellant was discriminated against on a disparate impact theory. (JA 205-215). The SPB specifically stated in a footnote that "arguably, a case can be made that the language requirement also constituted disparate treatment." (JA 213, fn. 14).

However, in the body of its opinion the Board specifically stated, "In this case, complainant presents a disparate impact claim." (JA 211). Although the Board acknowledged that a race discrimination claim can be either disparate treatment of disparate impact, they viewed Appellants claim as solely based upon disparate impact and neither considered nor made a finding related to disparate treatment. (JA 205, 615, l. 26).

In finding in favor of Appellant, The Board ordered that Appellant be given a full time position and be awarded back pay from the time he was denied a full time position. (JA 214). Defendant did not comply with the Board's mandate until four to six months later at which time Appellant began his full time employment and was awarded back pay for lost wages (JA 339, l. 10-17).

In July, 2004 Appellant filed a DFEH claim against Respondents alleging that he had been discriminated against and retaliated against on a continuous basis from November 1, 2002 through May 5, 2004 due to his having filed the SPB complaint and participating in the hearing. (JA 218, 219). DFEH issued a Right To Sue Notice on July 16, 2004. (JA 222). Appellant filed a second DFEH claim against Respondent EDD in July, 2005 alleging continuing retaliation and, at Appellant's request, received a Right To Sue Notice after which he timely filed the underlying action on July 11, 2005. (JA 071, l. 6-12).

In proximity in time after filing the SPB Complaint and testifying and prevailing at the hearing and shortly after filing the DFEH Complaints and informing his EDD supervisors of discrimination and retaliation, those supervisors subjected Appellant to numerous adverse employment actions which had a detrimental and materially adverse effect on the terms and conditions of his employment.

Those adverse employment actions were neither trivial nor minor as they included the following: denying him overtime and career promotions; maintaining a secret personnel file policy on him which apparently contained derogatory and negative comments which he still has not seen due to it being disparate treatment evidence for these proceedings; making false accusations about him involving dishonesty, violence, and insubordination; giving him unjustified low ratings on performance evaluations and unjustified reprimands; excessively scrutinizing, taunting and monitoring him for no legitimate reasons; violating his privacy rights; fraudulently preparing memos relating to him; physically touching him without his consent; denying him benefits to which he was entitled and other similarly adverse actions.

The totality of these actions materially affected Appellant's term and conditions of employment by creating a hostile work environment, characterized by tension and stress, for Appellant which caused him emotional distress and depression. (JA 669, 23-26). Appellant had to take time off from work due to the stress. (JA 349). Appellant necessarily spent much of his time at work protecting himself and his reputation by rebutting, through emails, meetings, memos and complaints. false and scurrilous accusations made directly to him or made to others relating to him. (JA 666, l. 6-10).

The Court of Appeal found that Respondent State of California took the following actions relating to Petitioner:

1) Denied him overtime opportunities by cancelling said opportunities when they learned he was applying (Court of appeal Decision (original "COA"): 32, 33, 2);

2) Denied him a promotion (original "COA": 34); 3);

3) Suspended him during the time he had protested discrimination and retaliation (original "COA": 36); 4);

4) Being physically bumped by his supervisor while being reprimanded after engaging in a protected act (original "COA": 36, 37);

5) Supervisor did not approve payment to Petitioner for time off (original "COA": 38-39);

6) Supervisor called Petitioner a "peon" in front of his co-workers (original "COA": 41; 7);

7) Supervisors waited 4-6 months to comply with the Order of the State Personnel Board by giving Petitioner a full time position after prevailing in a discrimination complaint (original "COA": : 44); 8);

8) Supervisors accusing Petitioner of insubordination, dishonesty and being discourteous due to his prevailing in a discrimination complaint, filing whistleblower complaint and responding to the retaliatory IDP(original "COA": : 44, 45); and 9); and

9) Petitioner's Supervisor physically touching Petitioner in an unwelcome manner by putting his arm around Petitioner and slapping him on the chest (original "COA": 46).

The respondent factually contends that Appellant has established a *prima facie* case of retaliation by providing evidence as follows: 1) He made protected disclosures; 2) He suffered adverse employment actions; and 3) A causal link between the protected disclosure and the adverse actions exists.

Respondent factually does not challenge or dispute that Appellant made protected disclosures as that issue was not raised in Respondent's Summary Judgment Motion nor was it ruled upon by the trial Court. Therefore, Appellant's nine protected disclosures are uncontested. Again, The Court of Appeal specifically found competent evidence to support the nine factual claims cited above. The Court of Appeal found the Respondent 1) Denied Petitioner overtime opportunities by canceling said opportunities when they learned he was applying (Court of Appeal Decision (original "COA"): 32, 33; 2) Denied him promotion (original "COA": 34); 3) Suspended him during the time he had protested discrimination and retaliation (original "COA": 36); 4) Petitioner's supervisor physically bumped Petitioner while reprimanding him (original "COA": 36, 37);

5) Petitioner's Supervisor did not approve payment to Petitioner for time off (original "COA": 38-39); 6) Supervisor called Petitioner a "peon" in front of his co-workers (original "COA": 41); 7) Supervisors waited 4-6 months to comply with the Order of the State Personnel Board by giving Petitioner a full time position (original "COA": 44); 8) Supervisors accused Petitioner of insubordination, dishonesty and being discourteous due to his prevailing in a discrimination complaint, filing whistleblower complaint and responding to the retaliatory IDP (original "COA": 44, 45); and 9) Petitioner's Supervisor physically touched Petitioner in an unwelcome manner by putting his arm around Petitioner and slapping him on the chest (original "COA": 46).

Although Appellant asserts that there was competent evidence to support many of his other claimed adverse employment actions and can be proven if given a trail, these nine actions are sufficient standing alone or certainly combined, to constitute adverse employment action(s). As a matter of clarification the Court of Appeal did not specifically find that each of the above-stated actions occurred as the Court cannot determine credibility, but did find that the record contained competent evidence presented by Petitioner of each of the actions. Therefore, a genuine issue of material fact unquestionably exists in this case. The Court of Appeal's decision erroneously states that even with this competent evidence to support these alleged facts, as a matter of law they are not, individually or in totality, adverse employment actions.

Unfortunately, both in our circuit and in the below case the Courts are unable to properly comprehend the *context and totality* of the employer's behavior with respect to any adverse action that underlies the discriminatory and retaliatory behavior since the Courts in our circuit have departed from the proper application of the McDonnell Douglas v Green precedence and burden shifting framework which is the *hallmark* of adequately measuring in real terms the necessary *context and totality* with respect to the respondent's questioned behavior in the work place to include the admitted adverse actions cited by the Courts taken against the employee in this case.

Also, by our circuit departing from the proper application of McDonnell Douglas v. Green's burden shifting framework the plaintiff will never prevail let alone receive a trial and survive summary judgment now or ever, because there is not the proper use and application of the McDonnell Douglas v. Green framework in place within our circuit.

Currently, the Courts in our circuit are unable to measure the proffered barely legitimate production of reason, which to a great extent goes to measuring *the context and totality* of behavior by the employer to include its [adverse] actions; in this case the employer was allowed to avoid providing a non-retaliatory business reasons to many of the adverse actions, and then provide a quasi reason later (rationalization after the fact), in essence thwarting any accountability with respect to the behavior in question, onerously circumventing the burden shifting frame work of McDonnell Douglas v. Green precedence. The *context and totality* of the adverse actions in question are also lost when the Courts depart from McDonnell Douglas v. Green precedence, not allowing the plaintiff to rebut the pretext whether it is the respondent's first proffered reason (to include no reason) or an illegally provided second quasi reason proffered later as in this case. By departing from McDonnell Douglas v. Green precedence allows the Courts to inadvertently trivialize the context *and totality* of the respondent's behavior, specifically "trivializing" the adverse actions cited.

McDonnell Douglas v. Green burden shifting framework is the *hallmark* with respect to the Courts ability to properly assess and/or measure the *context and totality* of any questioned behavior surrounding illegal discrimination and retaliation in our circuit, let alone anywhere else in the union. Without reviving and properly applying the McDonnell Douglas v. Green precedence in the Courts, no one will ever be able or willing to properly apply the methodology to identify and properly measure employer actions under the McDonnell Douglas v. Green burden shifting framework which goes to the context and totality of these adverse actions that underlie the illegal discrimination and retaliation in the work place. Given the departure of the McDonnell Douglas v. Green burden shifting framework, no citizen will dare to engage in the protected act of complaining, nor take a stand against these illegal acts, absent the proper application of the McDonnell Douglas v. Green precedence. Anti-discrimination laws are meaningless without the proper application of this precedence.

REASONS FOR GRANTING PETITION

The Circuits are divided.

This case squarely presents the conflict. California Plaintiffs will never be able to prevail in a discrimination or retaliation complaint if the defendant/respondents are able to avoid proffering a barely legitimate production of reason for their actions, and then proffer a different reason later, then bar the plaintiff from rebutting the pretext under the framework departure of the McDonnell Douglas v. Green precedence.

This case squarely presents the conflict.

California Plaintiff(s) will never prevail in any action given the Courts' departure from the McDonnell Douglas v. Green burden shifting paradigm.

The issue presented by the conflict is recurring and of great practical importance to all Californians.

When a plaintiff is never allowed to rebut the pretext, and any defendant in California is allowed to either not proffer a reason for their behavior timely (employer in this case allowed to provide no reason for many of the adverse actions up front), then provide a reason later as in this case, a stark contrast to the intended burden shifting framework as outlined in the McDonnell Douglas v. Green precedence.

The Decision below reflects widespread uncertainty over the meaning and application of McDonnell Douglas precedence in California which this Court alone can dispel.

The Decision Below is incorrect and has a disparate impact and/or treatment on all litigants given the Court's misapplying and/or departure from the intended McDonald Douglas precedence.

The defendant/respondent never proffered a barely legitimate production of reason timely with respect to explaining their behavior in question to include many of the adverse actions; then proffered a different reason later to include calling it "trivial" to avoid accountability under the McDonnell Douglas Framework. This completely spoils the process.

The plaintiff was also onerously denied the opportunity to rebut the pretext as well, which would otherwise have been allowed by the plaintiff under the intended McDonald Douglas precedence. Anti-discrimination statutes are absolutely meaningless if employers are allowed to discriminate and retaliate with vary small expectation that they will be held accountable by any Court for discriminatory and retaliatory behavior. Absent the proper application of McDonnell Douglas v. Green precedence, illegal discrimination and retaliation is allowed to run unabated.

In this case I spoke up and took a stand against the foreign language requirements imposed on hiring & promotions, a proven unnecessary business practice that excludes 94% percent of all African-Americans in California between the ages of 18-64 years old. It excludes 82% of all White Caucasians between the ages of 18-64 in California as well, both according to the 2000 census. This practice is ongoing.

I worked for the premiere employment agency, the State of California, Employment Development Department, the nation's largest governmental employment agency with roughly 12,000 employees statewide, a multi- billion dollar federally funded operation. The progressive retaliation I complained of personally was in fact "predictable," as it led up to my being fired shortly after filing an appeal with the fourth appellate Court.

The Supreme Court of the United States has indicated that retaliation for engaging in protected acts such as this is "plainly predictable."

CONCLUSION

The petition for a writ of certiorari should be granted in order to afford everyone equal protection under the law.

Respectfully submitted,

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INDEX TO APPENDICES

Appendix A, ...Page 3a

Court of Appeal, Fourth appellate District-Division One-State of California, Highest Court to review matter-Affirmed lower court-opinion was ruled not to be published

Appendix B, ...Page 57a

San Diego Superior Court, Ruling for Case GIC850412-Summary Judgment in favor of Respondent, Plaintiff is denied a trial.

Appendix C, ...Page 73a

California State Personnel Board Administrative Hearing-Found illegal Discrimination, Disparate impact theory, Respondent also successfully argues that disparate treatment theory should not be heard administratively.

Appendix D, ...Page 97a

California Supreme Court Petition- State of California, denied review

Appendix E, ...Page 101a

Petition to fourth appellate court for rehearing, Division One, State of California, Denied petition for rehearing.

APPENDEX A

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

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HIGHEST STATE COURT THAT REVIEWED THE MERITS OF THIS MATTER

Filed 9/21/07 Whaley v. State of California Employment Development Dept. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

[Date of Entry:

GARY S. WHALEY, D049396

Plaintiff and Appellant,

v. (Super.Ct. No. GIC850412)

STATE OF CALIFORNIA
EMPLOYMENT DEVELOPMENT DEPARTMENT,

Defendant and Respondent.

APPEAL from a judgment of the Superior Court of San Diego County, Kevin A. Enright, Judge. Affirmed.

Plaintiff Gary S. Whaley appeals a judgment entered after the trial court granted defendant State of California Employment Development Department's (EDD) motion for summary judgment in Whaley's unlawful discrimination and retaliation action against it. On appeal, Whaley contends the trial court erred by: (1) concluding his cause of action for unlawful discrimination based on a disparate treatment theory was barred by the applicable statute of limitations and the doctrines of collateral estoppel and exhaustion of administrative remedies; (2) concluding his cause of action for unlawful retaliation failed for insufficient evidence of any adverse employment action; (3) excluding certain evidence he submitted in support of his opposition to EDD's motion for summary judgment; (4) concluding his cause of action for unlawful retaliation also failed because he did not rebut EDD's showing of legitimate, non-retaliatory reasons for its actions; and (5) awarding costs to EDD.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2000, Whaley, a Caucasian male who speaks only English, was employed by EDD as a part-time, permanent intermittent employment program representative (EPR) at its Chula Vista call center.[1] An EPR is a telephone operator who takes applications for unemployment insurance over the telephone from the public and assists the callers in submitting their claims. An EDD call center services a diverse population across the state and frequently receives calls from individuals with limited or no English skills. When EPRs receive calls from individuals requiring an operator fluent in another language, they transfer that call to an EPR listed as fluent in that language. EPRs fluent in both English and another language are highly valued by EDD.

In September 2002, EDD and the California State Employees Association (a labor union that represents EPRs) entered into an agreement to convert 76 EPR statewide positions from part-time to full-time positions. Twelve of those positions were identified for the Chula

Vista call center, and required Spanish language fluency for six positions and Tagalog language fluency for the other six positions. In November, those 12 positions were converted to full-time positions. However, Whaley's position was not converted to a full-time position because he did not have the requisite language fluency.[2]

In May 2003, Whaley filed a complaint with the State Personnel Board (SPB), alleging EDD unlawfully discriminated against him on the basis of his race by not converting his part-time position to a full-time position. He argued that the bilingual requirement for EDD's conversion of part-time positions to full-time positions discriminated against him under both disparate treatment and disparate impact theories. Following a hearing, an SPB administrative law judge (ALJ) issued a proposed decision finding in Whaley's favor on the disparate impact theory.[3]

On January 11, 2005, after a thorough review of the administrative hearing record, the SPB found Whaley had proved he was unlawfully discriminated against on the basis of race under a disparate impact theory. The SPB

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[1] EDD has nine call centers throughout California.

[2] As reflected in Whaley's subsequent claim filed with the California Department of Fair Employment and Housing (DFEH), Whaley learned of EDD's position conversion agreement and that his position would not be converted to a full-time position at least by November 2002 when he admittedly instructed his union to file a discrimination complaint based on that action by EDD. Also, Whaley's separate statement did not dispute EDD's assertion that his "second cause of action for disparate treatment or intentional racial discrimination in this lawsuit [is] based solely on the EDD's November 2002 decision to convert positions with a language requirement."

[3] However, the ALJ found "[n]o credible evidence supported a disparate treatment theory."

stated: "While there is no evidence that the decision to impose the language requirement was necessarily motivated by a discriminatory intent, the impact from such a requirement is to deny most Caucasian employees and other ethnic groups whose primary language is something other than Spanish or Tagalog the conversion opportunity."[4] After finding Whaley had made a prima facie case of disparate impact, the SPB found EDD had not carried its burden to show a legitimate business necessity for the language requirement. Accordingly, the SPB ordered EDD to immediately appoint Whaley to a full-time EPR position and pay him back pay, with interest and benefits, from the time the other positions were converted. By mid-2005, EDD had converted Whaley's job to a full-time position and paid him all back pay required by the SPB's decision.[5]

On July 7, 2004, Whaley filed a claim with the DFEH, alleging EDD had discriminated and retaliated against him on a continuous basis from November 2002 through May 25, 2004. He alleged EDD's branch manager, Art Samaniego, and other supervisors mocked him, mimicked him, and made fun of him in front of his coworkers, violated his personal space, rejected his medical authorization to return to work, and discussed his medical records in the presence of his coworkers. His claim also referred to his pending complaint with the SPB regarding the conversion of part-time positions to full-time positions based on language fluency. On July 16, 2004, the DFEH sent Whaley a right-to-sue notice.

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[4] Nevertheless, the SPB stated in a footnote to its decision: "Arguably, a case can be made that the language requirement also constituted disparate *treatment* against non-Hispanic or non-Filipino PI EPRs."

[5] Whaley apparently did not appeal the SPB's decision by filing a petition for writ of mandate in the superior court. He does not dispute EDD's assertion in its brief that he "never filed a petition in superior court challenging the SPB's decision."

On or about July 11, 2005, Whaley apparently filed the instant action against EDD.[6] On August 19, Whaley filed the operative, first amended complaint in this case, alleging four causes of action: (1) racial and national origin discrimination in violation of Government Code section 12940, subdivision (a) based on a disparate impact theory; (2) racial and national origin discrimination in violation of Government Code section 12940, subdivision (a) based on a disparate treatment theory; (3) retaliation in violation of Government Code section 12940, subdivision (h) in response to his internal and DFEH complaints about discrimination and cooperation with authorities in their investigations and with the ALJ in his administrative hearing on the complaint he filed with the SPB; and (4) retaliation in violation of Labor Code section 1102.5 for his alleged whistle blowing actions. In January 2006, the trial court sustained EDD's demurrer to Whaley's fourth cause of action, leaving only the first three causes of action in this case.[7]

On May 2, EDD filed a motion for summary judgment or, in the alternative, summary adjudication. EDD argued: (1) Whaley could not establish he suffered an adverse employment action; (2) there was no nexus between Whaley's protected activity and EDD's actions; (3) EDD had legitimate, nondiscriminatory or non-retaliatory reasons for its actions; and (4) Whaley's discrimination claims were barred by the applicable statute of limitations and the doctrines of collateral estoppel and the failure to exhaust administrative remedies. In support of its motion, EDD submitted a separate statement of undisputed facts and declarations of certain EDD employees and its attorney. Whaley opposed EDD's motion for summary judgment, citing numerous actions by EDD that purportedly constituted adverse employment actions taken against him. In support of his opposition, he submitted a separate statement of disputed and undisputed facts and the declaration of his attorney, Joel C. Golden, to which were attached copies of the declarations of Richard Novick and Dr. Peter Briggs. In reply, EDD made various objections to certain evidence submitted by Whaley.

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[6] Although the record on appeal does not contain a copy of Whaley's initial complaint, EDD represents in its brief, and Whaley apparently does not dispute, that he filed his initial complaint in this case on July 11, 2005. Accordingly, for purposes of this opinion, we assume Whaley's initial complaint was filed on that date.

[7] Because neither Whaley's notice of appeal nor his opening brief challenges that ruling by the trial court, we presume he does not challenge that ruling on appeal and, in any event, conclude he has waived any challenge to that ruling.

On June 18, after hearing arguments on its tentative ruling, the trial court issued an order granting EDD's motion for summary judgment. After sustaining EDD's objections to much of Whaley's evidence, the trial court stated:

> "The racial discrimination [causes of action] (re treatment and impact of the 2002 language requirement in response to the conversion plan) have already been determined, or could have been determined, by the [SPB] decision in 2002. Thus[,] these causes of action are barred by the failure to appeal and exhaust administrative remedies through appeal of the SPB decision to the Superior Court. Those two (2) [causes of action] are also barred by applicable statutes of limitation and the doctrine of collateral estoppel. "The [third cause of action] for unlawful retaliation fails as a matter of law. First, [Whaley] has not shown any action by [EDD] that rises to the level of an adverse employment action. Even if the Court determines [Whaley] has shown such an adverse employment action, [EDD] has demonstrated by admissible evidence

> legitimate, non-retaliatory reasons for its actions. [Whaley] has not presented admissible evidence to raise a material issue of pretext by [EDD]."

On August 1, the trial court entered judgment for EDD. On October 6, the court awarded EDD its costs and denied Whaley's motion to strike certain of those costs. On October 10, the court amended its August 1 judgment to include that costs award.

Whaley timely filed a notice of appeal.

DISCUSSION

I

Second Cause of Action for Disparate Treatment

Whaley contends the trial court erred by concluding his second cause of action alleging unlawful discrimination based on a disparate treatment theory was barred by the applicable statute of limitations and the doctrines of collateral estoppel and exhaustion of administrative remedies.[8]

A

Government Code section 12940, subdivision (a) provides that it is an unlawful employment practice "[f]or an employer, because of the race [or] national origin . . . of any person, . . . to discriminate against the person in compensation or in terms, conditions, or privileges of employment." *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735 stated:

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[8] In Whaley's opening brief, he states he "is not appealing the Court granting Summary Judgment on the First Cause of Action, Racial Discrimination (Disparate Impact) in violation of California Government Code Section 12940[, subdivision] (a)." Because Whaley has waived any contention that the trial court erred by concluding EDD was entitled to summary adjudication in its favor on his first cause of action for unlawful discrimination based on disparate *impact*, we do not address that aspect of the trial court's decision.

> "In general, there are two types of illegal discrimination. These are disparate treatment and disparate impact. Under the disparate treatment theory, . . . an individual is discriminated against when the employer 'treats some people less favorably than others because of their race . . . or national origin.' [Citation.]" (*Heard*, at p. 1748.) Before bringing a civil action under Government Code section 12940, subdivision a) or another provision of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), a plaintiff generally must first file an administrative claim with the DFEH within one year of the discriminatory or other action that allegedly violated the FEHA. (Gov. Code, § 12960; *Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 90.) "The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA." (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492.) If the DFEH declines to pursue that claim, it will issue a right-to-sue notice that permits the plaintiff to file, within one year thereafter, his or her FEHA
> civil action. (Gov. Code, § 12965, subd. (b).)

B

In granting EDD's motion for summary judgment, the trial court concluded

Whaley's second cause of action for disparate treatment discrimination in violation of Government Code section 12940, subdivision (a) was barred by the applicable statute of limitations. In so doing, we presume the court was referring to FEHA's requirement that Whaley first file an administrative complaint with the DFEH within one year of the EDD's alleged discriminatory action. (Gov. Code, § 12960.) As noted above, in September 2002, EDD entered into the agreement with the EPR's union for conversion of certain part-time positions to full-time positions. In November 2002, that conversion of positions was effected and Whaley learned his position was not included in that conversion. Because Whaley's second cause of action for disparate treatment discrimination is based *solely* on EDD's exclusion of his position from its 2002 conversion of part-time positions to full-positions, he was required to file an administrative complaint with the DFEH within one year of that alleged discriminatory action (i.e., by November 2003). (Gov. Code, § 12960.) Because Whaley did not file a complaint with the DFEH until July 2004, his second cause of action is barred by his failure to first file a *timely* administrative complaint with the DFEH. (Gov. Code, § 12960; *Williams v. City of Belvedere, supra*, 72 Cal.App.4th at p. 90; *Romano v. Rockwell Internat., Inc.*, *supra*, 14 Cal.4th at p. 492.)

EDD's exclusion of his position from its conversion of certain part-time positions to full-time positions did *not* constitute a "continuing violation" that might delay the start of the one-year limitations period for filing an administrative complaint with the DFEH. Citing *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, Whaley argues the fact that EDD did not convert his position to a full-time position until May 25, 2004, shows EDD's alleged FEHA violation continued from November 2002 through May 2004 and therefore his July 2004 complaint with the DFEH was timely. "[T]he continuing violation doctrine comes into play when an employee raises a claim based on conduct that occurred in part outside the limitations period." (*Richards*, *supra*, at p. 812.) However, *Richards* does not require the application of the "continuing violation" doctrine in the circumstances of this case. In the context of an employer's alleged failure to accommodate (or prevent harassment based on) an employee's disability, *Richards* adopted the following standard for application of the "continuing violation" doctrine:

> "[W]e adopt a modified version of the *Berry* [*Berry v. Board of Sup'rs of L.S.U.* (5th Cir. 1983) 715 F.2d 971] test. As in *Berry*, we hold that an employer's persistent failure to reasonably accommodate a disability, or to eliminate a hostile work environment targeting a disabled employee, is a continuing violation if the employer's unlawful actions are (1) sufficiently similar in kind--recognizing, as this case illustrates, that similar kinds of unlawful employer conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms [citation]; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence. [Citation.] But consistent with our case law and with the statutory objectives of the FEHA, we further hold that 'permanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile.

> "Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, *either* when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, *or* when the employee is on notice that further efforts to end the unlawful conduct will be in vain." (*Richards*, *supra*, 26 Cal.4th at p. 823.)

Therefore, when an employer makes it clear to an employee "in a definitive manner" that it will not grant the employee's request (or, as in this case, the employee's position will not be converted to a full-time position), the one-year statute of limitations period begins to run. (*Richards*, at pp. 823-824.)

Applying the *Richards* test to this case, we conclude Whaley did not show there is a triable issue of fact relating to EDD's statute of limitations defense. EDD's decision in November 2002 not to convert Whaley's position to a full-time position was a single, discrete action, rather than a continuing course of conduct. That decision acquired a sufficient degree of permanence within the meaning of *Richards* in November 2002. Specifically, EDD's action in November 2002 made it "clear to a reasonable employee that any further efforts" to obtain a conversion of his or her position to a full-time position would be futile. (*Richards v. CH2M Hill, Inc.*, *supra*, 26 Cal.4th at p. 823.) Alternatively stated, because Whaley in November 2002 was, in effect, put "on notice that further efforts to end [EDD's alleged] unlawful conduct [would] be in vain," the one year statute of limitations for Whaley to file an administrative claim with the DFEH began to run in November 2002, making his July 2004 filing untimely. (*Ibid.*; *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1042-1043; cf. *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63-67.) EDD's conversion of Whaley's position to a full-time position in May 2004 pursuant to the SPB's order did not constitute either a separate FEHA violation or denote the end of the period of a continuing violation in denying him that conversion. Accordingly, Whaley's second cause of action for disparate treatment discrimination based on EDD's exclusion of his position from its conversion of part-time positions to full-time positions based on a language fluency requirement is barred by the applicable one-year statute of limitations. (Gov. Code, § 12960; *Williams v. City of Belvedere*, *supra*, 72 Cal.App.4th at p. 90; *Romano v. Rockwell Internat., Inc.*, *supra*, 14 Cal.4th at p. 492.)

C

Because the statute of limitations defense is sufficient by itself to support the trial court's conclusion that EDD was entitled to summary adjudication on Whaley's second cause of action, we need not address the remaining grounds cited by the trial court or EDD in support of that conclusion. Nevertheless, we briefly note that Whaley's second cause of action is also barred by the doctrines of collateral estoppel and exhaustion of *judicial* remedies. As noted above, in May 2003, Whaley filed a complaint with the SPB alleging EDD unlawfully discriminated against him on the basis of his race when it did not convert his part-time position to a full-time position. He argued the bilingual requirement for EDD's conversion of part-time positions to full-time positions discriminated against him under both disparate treatment and disparate impact theories. Therefore, in ultimately deciding in Whaley's favor based on his disparate impact theory, the

SPB necessarily considered, and implicitly rejected, his disparate treatment theory, expressly stating: "[T]here is no evidence that the decision to impose the language requirement was necessarily motivated by a discriminatory intent." Although the SPB added a footnote stating: "Arguably, a case can be made that the language requirement also constituted disparate *treatment* against non-Hispanic or non-Filipino PI EPRs," the SPB's decision implicitly found that Whaley had *not* carried his burden of proof on his disparate treatment theory. Despite the SPB's implicit rejection of Whaley's disparate treatment theory of discrimination, he did not challenge its administrative decision by filing a petition for writ of administrative mandamus in superior court. When "a public employee pursues administrative civil service remedies, receives an adverse finding, and fails to have the finding set aside through judicial review procedures, the adverse finding is binding on discrimination claims under the FEHA." (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 76.) "This requirement of exhaustion of judicial remedies is to be distinguished from the requirement of exhaustion of administrative remedies. . . . Exhaustion of *judicial* remedies . . . is necessary to avoid giving binding 'effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive *judicial* remedy for reviewing administrative action.' [Citation.]" (*Id.* at p. 70.)

Whaley's failure to pursue his judicial remedy and challenge the SPB's rejection of his disparate treatment theory resulted in the finality of that decision, involving application of the doctrine of collateral estoppel. (*Page v. Los Angeles County Probation Dept.* (2004) 123 Cal.App.4th 1135, 1142-1143.) "*Johnson* . . . ensures that employees who choose to utilize internal procedures are not given a second 'bite of the procedural apple.' " (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1090-1091.) Therefore, although Whaley may have had a right to pursue his disparate treatment discrimination claim both in a civil service proceeding before the SPB and in a FEHA action in superior court (had he first timely filed a claim with, and received a right-to-sue notice from, the DFEH), on receipt of an adverse ruling on that claim in the administrative proceeding by the SPB and his failure to exhaust his judicial remedies by filing a petition for writ of administrative mandamus, the SPB's ruling became binding on him in the instant pending FEHA action.

Applying the doctrine of collateral estoppel (or issue preclusion) in this case, the SPB's adverse ruling on Whaley's disparate treatment discrimination theory bars his second cause of action alleging that same theory. Whaley does not persuade us that the threshold requirements for the application of that doctrine have not been satisfied.[9] Accordingly, EDD was entitled to summary adjudication on Whaley's second cause of action. (*Castillo v. City of Los Angeles*, *supra*, 92 Cal.App.4th at pp. 486-487.)

II

Trial Court's Evidentiary Rulings

Whaley contends the trial court erred in sustaining EDD's objections to certain evidence he submitted in support of his opposition to EDD's motion for summary judgment.

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[9] The threshold requirements for the application of the doctrine of collateral estoppel (or issue preclusion) are: (1) the issue sought to be precluded from relitigation is identical to an issue decided in a former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the issue was necessarily decided in the former proceeding; (4) the decision in the former proceeding is final and on the merits; and (5) the party against whom preclusion is sought was a party (or in privity with a party) to the former proceedings. (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481; *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 242.) That doctrine applies to also bar relitigation of issues resolved in a prior administrative hearing by an agency acting in a judicial capacity. (*Knickerbocker*, *supra*, at p. 242.)

A

Although, as we discuss in part III *post*, we generally apply a de novo standard in reviewing a trial court's order granting or denying a motion for summary judgment, in the course of reviewing a summary judgment "we review the trial court's final rulings on evidentiary objections by applying an abuse of discretion standard. [Citations.]" (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122; see also *Hollywood Screentest of America, Inc. v. NBC Universal, Inc.* (2007) 151 Cal.App.4th 631, 643-645; *Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 467; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694 ["the weight of authority holds that an appellate court reviews a court's final rulings on evidentiary objections by applying an abuse of discretion standard"]; *Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 928; *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169.) Accordingly, in reviewing the trial court's rulings sustaining EDD's objections to certain evidence submitted by Whaley in support of his opposition to EDD's motion for summary judgment, we generally defer to the trial court and overrule its evidentiary rulings only if they constitute an abuse of its discretion.

B

In its order granting EDD's motion for summary judgment, the trial court first ruled on EDD's objections to certain evidence submitted by Whaley in opposition to EDD's motion for summary judgment. *Novick's Declaration.* Whaley argues the trial court erred by sustaining EDD's objections to Novick's declaration that he submitted in opposition to EDD's motion. Citing various specific grounds, EDD objected to paragraphs 7 through 14 of Novick's declaration.[10]

The trial court sustained EDD's objection to paragraph 7, which stated:

> "7. The [SPB] agreed with Mr. Whaley in ruling that there was no legitimate business reason for the foreign language requirements and that it did have a disparate impact on Mr. Whaley because he is Caucasian."

The court sustained EDD's objection to that paragraph, citing the grounds of "lack of foundation as to how he [Novick] has any personal knowledge of the [SPB] decision. Further, his recitation of what he believes the [SPB's] decision states is hearsay as it is an out of court statement offered for its truth." Rather than arguing the court erred by excluding paragraph 7 on those grounds, Whaley argues the SPB's decision was already in evidence and showed Novick's statement was accurate. However, in so doing, Whaley does not carry his appellate burden to show the court abused its discretion by excluding paragraph 7 on grounds of lack of foundation and hearsay. Accordingly, we conclude the court properly sustained EDD's objection to paragraph 7.

The trial court also sustained EDD's objection to paragraph 8, which stated:

> "8. The [SPB] ordered that EDD give Mr. Whaley full time employment and back pay for the amount of compensation he lost in being

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[10] In those portions of Novick's declaration to which EDD did not object, Novick stated he was employed by EDD from 1977 until 2005 and directly supervised Whaley from April 7, 2003, through April 6, 2005.

> denied full time employment because he did not speak Spanish or Tagalog."

The court sustained EDD's objection to that paragraph, citing the grounds of "lack of foundation as to how he [Novick] has any personal knowledge of the [SPB] decision, or why he, as a former employee of EDD, would be competent to testify on the [SPB's] decision. Further, his recitation of what he believes the [SPB's] decision states is hearsay as it is an out of court statement offered for its truth." As he did regarding paragraph 7, Whaley merely argues the SPB's decision was already in evidence and showed Novick's statement was accurate. However, in so doing, Whaley does not carry his appellate burden to show the court abused its discretion by excluding paragraph 8 on grounds of lack of foundation and hearsay. Accordingly, we conclude the court properly sustained EDD's objection to paragraph 8.

The trial court also sustained EDD's objection to paragraph 9, which stated:

> "9. In close time proximity after his filing the discrimination claim with the [SPB] and testifying at the hearing and ultimately prevailing as well as Mr. Whaley filing a DFEH and EEOC discrimination and retaliation claim, I became aware of ill will against Mr. Whaley by certain of his supervisors including Art Samaniego, Ann Hallahan, Rebecca Davidson and Mary Castillo; and based on information and belief, I became aware of ill will against Mr. Whaley by certain of his superiors including Pat Polak and Phil Wendell for the same reasons relating to his filing discrimination complaints."

The court sustained EDD's objection to that paragraph, stating:

> "[L]ack of foundation as to how he has any knowledge of any alleged ill will against Mr. Whaley by any of the named supervisors. He was not Mr. Whaley's supervisor at the time Whaley was allegedly retaliated against. Further[,] his impression other supervisors had ill will toward Mr. Whaley is [conclusory]. He states no facts which would show he has a basis for believing any of the named supervisors had ill will toward Mr. Whaley. [Citation.] Additionally, because there is no explanation for how Mr. Novick came to his subjective impression, his conclusion is also an improper lay opinion. ([Evid. Code, § 800.]) Lastly, Mr. Novick's feeling certain supervisors bore Mr. Whaley ill will is irrelevant. The issue in racial discrimination or retaliation cases is not whether a supervisor liked an employee but whether an adverse employment action was motivated by racial or retaliatory animus."

Whaley merely argues the court erred by concluding Novick's statement that he became aware of ill will by Whaley's supervisors was conclusory. Whaley asserts ill will is synonymous with unfriendly behavior and can be personally observed However, in so doing, Whaley does not refute the other grounds cited by the court for excluding paragraph 9 (e.g., lack of foundation). The court found Novick's declaration showed he was not Whaley's supervisor at the time of the alleged retaliation. Because his declaration did not state a sufficient foundational basis for his personal knowledge of the purported ill will against Whaley, the court did not abuse its discretion by excluding paragraph 9 (i.e., Novick's conclusory statement(s) that

Whaley's supervisors bore him ill will). (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1120.)

The trial court also sustained EDD's objections to paragraph 10, citing a lack of foundation as to how Novick had personal knowledge of 14 alleged retaliatory actions. Absent a sufficient foundational basis for his personal knowledge, the court further concluded Novick's opinion regarding EDD's alleged retaliatory animus was conclusory and an improper lay opinion. The court further stated: "Employment discrimination cases have held inadmissible a witness'[s] opinion as to whether an actor was motivated by an impermissible racial animus. [(*Hester v. BIC Corp.* (2d Cir. 2000) 225 F.3d 178, 184-186 (*Hester*); *Alexis v. McDonald's Restaurants of Massachusetts* (1st Cir. 1995) 67 F.3d 341, 347.) (*Alexis*)]" Whaley only argues the court erred by excluding four of those 14 retaliatory statements. Accordingly, he has waived any contention the trial court erred by excluding the remaining 10 of those 14 statements. Furthermore, although the trial court also sustained EDD's objections to an additional 10 statements based only on Novick's information and belief (citing *Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1124), Whaley does not argue the court erred in excluding those statements. Therefore, we conclude, at the outset, Whaley has not carried his burden on appeal to show the trial court abused its discretion by excluding 20 of the 24 statements made by Novick in paragraph 10. Regarding the four statements by Novick that Whaley argues were wrongly excluded by the court, Whaley asserts all four of those statements (numbered 3, 5, 10, and 13) were, in fact, expressly based on Novick's personal knowledge and observation and therefore should not have been excluded. Paragraph 10 of Novick's declaration stated in relevant part:

> "10. This ill will manifested itself in retaliatory actions taken against Mr. Whaley. Those actions included, but were not limited to, the

> following: . . . 3) Ann Hallahan expressing disapproval to me that I did not give Mr. Whaley a low rating in terms of 'relationships with people' on an individual development plan; . . . 5) Ann Hallahan suggesting and authorizing me to destroy personnel records pertaining to Mr. Whaley; . . . 10) Ms. Hallahan and Mr. Samaniego forwarding negative information to me regarding Mr. Whaley's job performance through other supervisors all the while hiding the actual source of the information; . . . 13) Mary Castillo telling me that Mr. Whaley was paranoid and a liar; . . . ."

Assuming arguendo Whaley correctly asserts Novick's four statements were sufficiently based on his personal knowledge and therefore did not lack a proper foundation, we nevertheless conclude, as the trial court did, those statements were inadmissible to show those EDD employees identified by Novick bore a retaliatory animus against Whaley. In objecting to those statements in Novick's declaration, EDD asserted that "opinions of lay witnesses that an actor was motivated by improper . . . retaliatory animus are inadmissible," citing the *Hester* and *Alexis* cases as support. In sustaining EDD's objections, the trial court restated that legal principle and also cited the *Hester* and *Alexis* cases. We agree with the trial court's conclusion in excluding paragraph 10 of Novick's declaration on the basis that it impermissibly states a lay opinion that the described actions of other EDD employees were based on a retaliatory animus. Although the actions of the EDD employees described in the four statements quoted above may be consistent with a retaliatory animus against Whaley, Novick's declaration showed no basis on which he (Novick) could base his opinion that those actions were motivated by or based on a retaliatory animus for Whaley's protected activity. (Cf. *Hester*, *supra*, 225

F.3d at pp. 184-186; *Alexis, supra*, 67 F.3d at p. 347.) As quoted above, paragraph 10 of Novick's declaration began: "This ill will manifested itself in retaliatory actions taken against Mr. Whaley. Those actions included, but were not limited to, the following: . . . ." Therefore, all of the actions listed after that prefatory statement were actions to support Novick's improper lay opinion that the actors bore a retaliatory animus against Whaley. (Cf. *Hoover v. Community Hotel Development Corp. v. Thomson* (1985) 167 Cal.App.3d 1130, 1136 ["a statement of someone else's intent, as contrasted with a statement of one's own intent, is a mere conclusion of law [,]" and therefore is incompetent evidence in opposing a motion for summary judgment.].) Accordingly, we 21 conclude the trial court did not abuse its discretion by excluding paragraph 10 of Novick's declaration.[11]

The trial court also sustained EDD's objections to paragraph 11 of Novick's declaration. However, because Whaley's opening brief does not argue the court erred in excluding that paragraph, we conclude Whaley has waived any error and has not carried his burden on appeal to show the trial court abused its discretion by excluding paragraph 11.

The trial court also sustained EDD's objections to paragraph 12 of Novick's declaration, which stated:

> "12. As his supervisor I noticed that his working conditions became hostile and

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[11] Had Novick simply stated his personal observations without the prefatory statement that the described actions constituted retaliatory actions taken against Whaley, then arguably the described actions, by themselves, may have been proper evidence that a trier of fact could then consider, together with all other evidence, in determining whether EDD bore a retaliatory animus against Whaley. However, because that is not the record before us, we need not address that question or otherwise consider the four actions described by Novick that Whaley argues were erroneously excluded.

> oppressive to the extent that it interfered with his performance and negatively impacted his ability to advance in his career. It became increasingly unlikely that Mr. Whaley could be promoted in the wake of this concerted negative retaliatory campaign against him by those supervisory individuals in and out of his chain of command."

In excluding that paragraph, the trial court stated:

> "[T]his is [a] legal conclusion unsupported by evidentiary facts. Objections to [conclusory] declarations are properly sustained where there are no facts supporting the conclusion. [(*Hoover v. Community Hotel Development Corp. v. Thomson, supra,* 167 Cal.App.3d at pp. 1135-1137.)]" In challenging the court's exclusion of paragraph 12, Whaley argues Novick's statements properly described his (Novick's) personal observations as Whaley's supervisor that Whaley's working conditions became so hostile and oppressive that they negatively impacted his job performance and career. However, similar to our conclusion regarding the court's exclusion of paragraph 10 above, we conclude Novick's declaration in paragraph 12 impermissibly states both a lay and legal opinion that Whaley's work conditions were so hostile and oppressive that they negatively affected his job performance and career advancement, and that a promotion was increasingly unlikely because of "this concerted negative retaliatory campaign against him."

Assuming Novick personally observed Whaley's adverse working conditions (e.g., hostility displayed by other EDD supervisors toward Whaley) and their effect on Whaley's job performance, Novick's declaration showed no basis on which he could base his opinion that those working conditions were caused by a retaliatory animus (or, as Novick phrased it, a "concerted negative retaliatory campaign") for Whaley's protected activity. (Cf. *Hester, supra,* 225 F.3d at pp. 184-186; *Alexis, supra,* 67 F.3d at p. 347.) Accordingly, the trial court properly excluded Novick's improper lay or legal opinion that Whaley's adverse working conditions were the result of EDD's retaliatory animus against him. (*Hester*, at pp. 184-186; *Alexis,* at p. 347; *Hoover v. Community Hotel Development Corp. v. Thomson, supra,* 167 Cal.App.3d at p. 1136 ["a statement of someone else's intent, as contrasted with a statement of one's own intent, is a mere conclusion of law[,]" and therefore is incompetent evidence in opposing a motion for summary judgment.].) Accordingly, we conclude the trial court did not abuse its discretion by excluding paragraph 12 of Novick's declaration.

The trial court also sustained EDD's objections to paragraph 13 of Novick's declaration. However, because Whaley's opening brief does not argue the court erred in excluding that paragraph, we conclude Whaley has waived any error and has not carried his burden on appeal to show the trial court abused its discretion by excluding paragraph 13.[12]

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[12] Because the trial court did not expressly sustain EDD's objection to paragraph 14 of Novick's declaration, we assume it considered that paragraph in granting EDD's motion for summary judgment. Accordingly, in reviewing the court's order granting EDD's motion for summary judgment, we consider that paragraph together with all other competent evidence submitted by the parties (other than evidence properly excluded by the court).

Attorney Golden's Declaration. Whaley argues the trial court erred by sustaining EDD's objections to his attorney's (i.e., Joel C. Golden) declaration submitted in opposition to EDD's motion.

That declaration states:

> "I, Joel C. Golden, hereby declare that the following are true and correct copies of that which they purport to be:
>
> "1. Exhibit A is a true and correct copy of Richard Novick's Declaration;
>
> "2. Exhibit B is a true and correct copy of Dr. Peter Briggs'[s] Declaration;
>
> "3. Exhibits C, D, E, F and G are true and correct copies of documents produced to me by EDD in response to my document requests."

Apparently attached to Golden's declaration were copies of the referred-to exhibits. EDD objected to paragraphs 4, 5, 6, and 8 of Briggs's declaration (i.e., Exhibit B attached to Golden's declaration) and to all of Exhibits C, D, E, F, and G attached to Golden's declaration. The trial court sustained all of those objections raised by EDD.

Because Whaley's opening brief does not argue the court erred in excluding paragraphs 4, 5, 6, and 8 of Briggs's declaration (i.e., Exhibit B attached to Golden's declaration), we conclude Whaley has waived any error and has not carried his burden on appeal to show the trial court abused its discretion by excluding those paragraphs.

Whaley argues the trial court erred by excluding Exhibits C, D, E, F, and G to Golden's declaration. In sustaining EDD's objections to those exhibits, the trial court cited the ground of lack of proper authentication of those documents.[13] We conclude the trial court properly found those documents were not properly authenticated. Evidence Code section 1400 provides: "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." Evidence Code section 1401 provides: "(a) Authentication of a writing is required before it may be received in evidence. [¶] (b) Authentication of a writing is required before secondary evidence of its content may be received in evidence." Therefore, authentication of a document requires the introduction of evidence sufficient to support a finding that the document is the writing that the proponent of the evidence purports it to be. (Evid. Code, § 1400; *McAllister v. George* (1977) 73 Cal.App.3d 258, 262.) Golden's declaration merely stated the proffered documents were "true and correct copies of documents produced to me by EDD in response to my document requests." However, the fact that Golden, as Whaley's attorney, received copies of those documents from EDD in the course of discovery is insufficient evidence to support a finding those documents were, in fact, what Golden purported them to be. (Cf. *O'Laskey v. Sortino* (1990) 224 Cal.App.3d 241, 249, disapproved on another ground in *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 768.) Golden's declaration did not show he had a personal knowledge regarding the authenticity of any of those documents. (*Ibid.*) Accordingly, the trial court did not abuse its discretion by excluding

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[13] Those documents apparently consist of various internal e-mails sent by certain EDD supervisors and employees.

Exhibits C, D, E, F, and G to Golden's declaration.[14]

III

Third Cause of Action for Unlawful Retaliation

Whaley contends the trial court erred by concluding his third cause of action for unlawful retaliation failed for insufficient evidence of any adverse employment action.

A

On appeal from a summary judgment, we apply a de novo, or independent, standard of review in determining whether there are triable issues of material fact and whether the moving party is entitled to judgment as a matter of law. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1109 (*Loggins*); *Powell v. Kleinman, supra*, 151 Cal.App.4th at p. 121; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*); *Walker v. Countrywide Home Loans, Inc., supra*, 98 Cal.App.4th at p. 1168.) "[W]e must consider all the evidence set forth in the moving and opposing papers except evidence to which objections were made and [properly] sustained. [Citation.]" (*Loggins*, at p. 1109.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar*, at p. 843.)

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[14] *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028 (*Yanowitz*), at page 1037, cited by Whaley, does not show otherwise. Although *Yanowitz* states the general rule that on appeal from a summary judgment, the reviewing court liberally construes the evidence in support of the party opposing the motion for summary judgment and resolves doubts regarding the evidence in that party's favor, that general rule does *not* require that we consider evidence properly excluded by a trial court under applicable rules of evidence (e.g., lack of proper authentication of documents). (*Ibid.*)

Powell summarized the shifting burdens of the parties in supporting or opposing a motion for summary judgment:

> "A defendant moving for summary judgment has the initial burden of showing that *a cause of action lacks merit because one or more elements of the cause of action cannot be established* or there is an affirmative defense to that cause of action. (Code Civ. Proc., § 437c, However, if the moving papers make a prima facie showing that justifies a judgment in the defendant's favor, the burden shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, 25 Cal.4th at p. 849.)
>
> "In determining whether the parties have met their respective burdens, the court must 'consider all of the evidence' and 'all of the inferences reasonably drawn therefrom,' and 'must view such evidence [citations] and such inferences [citations] . . . in the light most favorable to the opposing party.' (*Aguilar*, *supra*, 25 Cal.4th at pp. 844-845.) 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' (*Aguilar*, 25 Cal.4th at p. 850, fn. omitted.) Consequently, a defendant moving for summary judgment must 'present evidence that would require . . . a trier of fact *not* to find any underlying material fact more likely

> than not.' (*Id.* at p. 845.)" (*Powell v. Kleinman*, *supra*, 151 Cal.App.4th at pp. 121-122, first italics added.)

To obtain a summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action . . . . [T]he defendant need not himself conclusively negate any such element . . . ." (*Aguilar*, at p. 853.) "To avoid summary judgment, admissible evidence presented to the trial court, not merely claims or theories, must reveal a triable, material factual issue. [Citation.] Moreover, the opposition to [a motion for] summary judgment will be deemed insufficient when it is essentially [conclusory], argumentative or based on conjecture and speculation. [Citations.]" (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11.)

B

"[T]o establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an *adverse employment action*, and (3) a causal link existed between the protected activity and the employer's action. [Citations.] Once an employee establishes a 28 prima facie case, the employer is required to offer a legitimate, non-retaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation. [Citation.]" (*Yanowitz, supra,* 36 Cal.4th at p. 1042, italics added.)

The shifting burden also applies in the context of a motion for summary judgment in a FEHA retaliation case, as we recently stated:

> "When a plaintiff alleges retaliatory employment [action] . . . as a claim under the FEHA . . . , and the defendant seeks summary judgment, California follows the burden-shifting analysis of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [36 L.Ed.2d 668, 93 S.Ct. 1817] to determine whether there are triable issues of fact for resolution by a jury. [Citation.] In the first stage, the 'plaintiff must show (1) he or she engaged in a "protected activity," (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action.' [*Yanowitz, supra,* 36 Cal.4th at p. 1042] If the employee successfully establishes these elements and thereby shows a prima facie case exists, the burden shifts to the employer to provide evidence that there was a legitimate, non-retaliatory reason for the adverse employment action. [Citation.] If the employer produces evidence showing a legitimate reason for the adverse employment action, 'the presumption of retaliation " ' "drops out of the picture," ' " ' [citation], and the burden shifts back to the employee to provide 'substantial responsive evidence' that the employer's proffered reasons were untrue or pretextual [citation]." (*Loggins, supra,* 151 Cal.App.4th at pp. 1108-1109.)

Regarding the second element of an "adverse employment action," *Yanowitz* discussed "the appropriate standard for determining whether an employee has been subjected to an adverse employment action for purposes of a retaliation claim under the FEHA." (*Yanowitz, supra*, 36 Cal.4th at p. 1049.) *Yanowitz* stated:

> "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an *adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable*, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz, supra*, at p. 1052, italics added, fn. omitted.)

The Supreme Court further stated: "Appropriately viewed, [Government Code section 12940] protects an employee against unlawful discrimination with respect not only to socalled ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) [discrimination] (or give rise to a [retaliation] claim under section 12940(h)), the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Yanowitz, supra*, at pp. 1053-1054, fns. omitted.)

The court explained:

> "[T]he determination of what type of adverse treatment properly should be considered discrimination in the terms, conditions, or privileges of employment is not, by its nature, susceptible to a mathematically precise test, and the significance of particular types of adverse actions must be evaluated by taking into account the legitimate interests of both the employer and the employee. *Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion* falls within the reach of the antidiscrimination provisions of sections 12940(a) and 12940(h)." (*Yanowitz, supra*, 36 Cal.4th at pp. 1054-1055, italics added, fn. omitted.)

In determining whether alleged retaliatory conduct constitutes adverse employment action, we need not "decide whether each alleged retaliatory act constitutes an adverse employment action in and of itself. . . . [T]here is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. [Citations.]" (*Yanowitz, supra*, 36 Cal.4th at p. 1055.) Therefore, we consider the totality of the circumstances of an employer's alleged retaliatory acts in determining whether, collectively, those acts constituted adverse employment action satisfying the second element of a FEHA retaliation claim. (*Id.* at pp. 1052, fn. 11, 1056.) retaliatory acts, as supported by competent evidence in opposition to the motion, to determine whether there is a triable issue of fact whether those acts, taken together, Accordingly, in the context of an employer's motion for summary judgment, we independently consider the totality of the circumstances of the employer's alleged materially affected the terms, conditions, or privileges of the employee's employment. (*Id.* at pp. 1052-1056.)

C

Whaley argues the trial court erred by concluding he did not show any of EDD's actions rose to the level of an adverse employment action.[15] By so concluding, the trial court, in effect, found EDD had satisfied its initial burden of showing Whaley could not establish the second element of a FEHA retaliation cause of action (i.e., adverse employment action), and Whaley had not satisfied his burden to present sufficient competent evidence to support a finding EDD took adverse employment action against him.

On appeal, Whaley's opening brief lists 29 alleged adverse employment actions by EDD, accompanied by citations to supporting evidence, which, considered collectively, constituted adverse employment action against him.[16] However, because some of the evidence cited by Whaley as support for many of those alleged adverse acts was properly excluded by the trial court, as we concluded in part II, *ante*, and other cited evidence is not competent evidence (as we conclude below), we first address the sufficiency of the evidence in support of those 29 alleged adverse acts and then consider whether those acts that *are* supported by competent evidence, taken collectively, constituted adverse employment action under FEHA as interpreted by *Yanowitz*.

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[15] Because EDD did not argue below that Whaley had not engaged in an activity protected under the FEHA, we presume the first element of a retaliation cause of action had not been disproved by EDD for summary judgment purposes.

Whaley's 29 Alleged Adverse Employment Acts by EDD. In Whaley's opening brief, he alleges the following acts by EDD constituted adverse employment action against him (with citations to the record for evidence to support those alleged acts), each of which we discuss:

1. "Denying [Whaley] overtime opportunities." As supporting evidence, Whaley first cites a page from the SPB's decision that does not make any reference to, or

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[16] Although Whaley does not specifically show those acts (with citations to supporting evidence) were included in his separate statement of undisputed facts, we will presume, for purposes of this appeal, they were included among the various acts by EDD that he alleged therein constituted adverse employment action against him. However, although Whaley argues in his reply brief that EDD did not object to the evidence he cited in support of those 29 alleged adverse acts and therefore waived any objections (pursuant to Code Civ. Proc., § 437c, subd. (b)(5)) to that evidence, we decline to apply that waiver principle in the circumstances of this case. Our review of Whaley's separate statement shows that the only evidence *he* cited in support of the alleged adverse acts was evidence to which EDD did, in fact, object and the trial court properly excluded as we discussed in part II, *ante*. To the extent Whaley's opening brief now cites as support evidence cited by *EDD* in support of its separate statement, Code of Civil Procedure section 437c, subdivision (b)(5) did not require EDD to object to its own evidence cited in support of its separate statement submitted in moving for summary judgment,

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especially when Whaley did not then cite that evidence in support of his separate statement.

finding on, a denial by EDD of overtime opportunities to Whaley. However, Whaley also cites a page from the transcript of his deposition testimony. Whaley testified there was a day he and two other EDD employees were willing to work overtime to resolve some computer issues, but when Mary Castillo, apparently an EDD supervisor, "found out that I was one of the three, she [canceled] the overtime for everyone." Whaley believed the overtime was canceled based on Castillo's "reaction . . . towards me being there, not because of some other reason" and because he had subpoenaed documents from EDD. Whaley also cites a page from his response to EDD's special interrogatories in which he apparently referred to that same incident, stating: "Castillo cancels overtime for three employees once she finds out I am a candidate to work overtime." We conclude Whaley's cited evidence shows he had personal knowledge of a purported incident in which Castillo canceled overtime work allegedly because he would have been included in the overtime group. Accordingly, we consider that alleged adverse act together with those other alleged acts supported by competent evidence.

2. "Maintaining secret files containing derogatory statements relating to [Whaley] and refusing his requests to see said files." As sole support for that statement, Whaley cites a page from the transcript of his deposition in which he testified: "[T]here's an official personnel file, a local personnel file, and a supervisor drop file, *and* then of course it's been conceded *there's secret or private files that are kept on me*." (Italics added.) However, that page contains no other testimony showing he had personal knowledge of secret files maintained on him (or any other evidence supporting that purported fact). Because Whaley's allegation that EDD maintained secret files appears to be based on hearsay and/or his own speculation and is not supported by competent evidence, we exclude that alleged adverse act by EDD from our consideration of those acts supported by competent evidence.

3. "Knowingly making false accusations against him including attributing acts of violence to him[,] all of which damaged his reputation." As sole support for that statement, Whaley cites the transcript of his deposition in which he testified: "In January of 2005, Davidson and Hallahan allegedly pressured another employee to try to fabricate an assault complaint against me . . . ." However, that testimony does not show, or support a reasonable inference, that Whaley had first-hand or other personal knowledge of the alleged incident in which two apparent EDD supervisors pressured another (unnamed) employee to fabricate an assault complaint against Whaley. Because that allegation appears to be based on hearsay and is not supported by competent evidence, we exclude that alleged adverse act by EDD from our consideration of those acts supported by competent evidence.

4. "[Whaley] was denied a promotion to the position of Computer Specialist without [an] SPB ranking/review and back up position opportunity was canceled when it was learned [Whaley] was interested." As support for that statement, Whaley cites an excerpt from his response to EDD's special interrogatories in which he stated: "I was denied a computer specialist position [without an] SPB ranking/review (also back up position [canceled] by local management team when it was learned I was interested)." Based on that interrogatory response, it appears Whaley had personal knowledge regarding the circumstances of that alleged incident. Furthermore, EDD's respondent's brief does not challenge the evidence offered in support of that alleged incident.

Accordingly, we consider that alleged adverse act together with other alleged acts supported by competent evidence.

5. "Unjustifiably giving [Whaley] low ratings on performance evaluations." As support for that statement, Whaley cites an excerpt from his response to EDD's special interrogatories in which he stated: "I received a retaliatory Individual Development Plan

from Polak[,] who to this date has not sat down to discuss it with me . . . ." Although that evidence shows Whaley apparently had personal knowledge of an individual development plan (which we assume is a type of job performance evaluation or plan), Whaley's statement that he was "[u]justifiably giv[en] low ratings" is conclusory and unsupported by any other statement or evidence showing he received unjustifiable low ratings on performance evaluations. Accordingly, we exclude that alleged adverse act by EDD from our consideration of those acts supported by competent evidence.

6. "Excessively scrutinizing [Whaley] by tracking all of his activities for months." As support for that statement, Whaley cites an excerpt from his response to EDD's special interrogatories in which he stated: "Davidson assists Samaniego in patrolling/monitoring my work cube-neither my supervisor nor in my chain of command-retaliation." However, his interrogatory statement that his work was monitored by other EDD supervisors does not support his allegation that his work activities were "[e]xcessively scrutiniz[ed] . . . for months." Accordingly, we exclude that alleged adverse act by EDD from our consideration of those acts supported by competent evidence.

7. "Mocking and taunting [Whaley] in front of his [coworkers]." As support for that alleged act, Whaley cites two pages from the transcript of his deposition in which he describes EDD supervisors apparently staring at him and, in some instances, laughing at him, which he believed to be taunting. Based on our interpretation of the record, that deposition testimony is insufficient to support a reasonable inference that EDD supervisors mocked and taunted him. Rather, that supporting evidence shows, at most, that supervisors occasionally stared at him and laughed in his presence. Accordingly, we exclude the alleged adverse acts of mocking and taunting him from our consideration of those acts supported by competent evidence.

8. "[Whaley] was suspended by his supervisors for filing a [workers' compensation] complaint during the

period of time when the foreign language requirements were imposed[,] which was also the same time that [Whaley] protested illegal orders and retaliation." As support for that alleged act, Whaley cites an excerpt from his response to EDD's special interrogatories in which he stated he was: "Suspended by Wendell/Castillo/Hallahan and others for filing a [workers' compensation] complaint during the period [of] time . . . the foreign language requirements [were] imposed[;] also same period of time [I] took stand against illegal orders-retaliation." Whaley presumably had personal knowledge of his purported suspension and its proximity in time to the conversion of positions based on language fluency. However, to the extent Whaley's interrogatory statement asserted his suspension was imposed "for filing a [workers' compensation] complaint," that statement is conclusory and does not contain sufficient facts on which to conclude Whaley had personal knowledge of the reason(s) for his suspension. Similarly, that statement's reference to Whaley's "stand against illegal orders-retaliation" is both vague and conclusory as to what orders he objected to and how they may have been retaliatory. Accordingly, we consider only a portion of the alleged adverse acts taken by EDD (i.e., Whaley's suspension around the time of the position conversion) and exclude the remainder of the alleged acts.

9. "Supervisor Davidson bumped [Whaley] while reprimanding him and Supervisor Samaniego witnessed it and was unwilling to register and investigate [Whaley's] concerns after [Whaley] complained to him." As support for that alleged act, Whaley cites an excerpt from his response to EDD's special interrogatories in which he stated: "Davidson bumped me while reprimanding me in backroom. He was not my supervisor nor in my chain of command-retaliation, and Art Samaniego present (guarding door)[;] however, he was unwilling to register and investigate my concerns afterwards with respect to what just transpired-retaliation." Whaley presumably had personal

knowledge of this incident during which Davidson purportedly bumped him while reprimanding him in Samaniego's presence and Samaniego's failure to investigate.[17] Accordingly, we consider that alleged adverse act together with other alleged acts supported by competent evidence.

10. "Supervisors Samaniego, Wendell and/or Hallahan instruct Torres ([Whaley's] supervisor) not to turn over [Whaley's] personnel file to him after he had filed . . .discrimination and retaliation complaints." As support for that alleged act, Whaley cites an excerpt from his response to EDD's special interrogatories in which he stated: "Samaniego/Wendell/Hallahan instructs Torres not to turn over personnel files for my review and photocopy after my filing a discrimination complaint-retaliation." However, that interrogatory statement does not show Whaley had first-hand or other personal knowledge of the alleged incident in which one or more of those supervisors instructed Torres not to turn over personnel files to Whaley for his review. Because Whaley's alleged adverse act #10 appears to be based on hearsay and is not supported by competent evidence, we exclude that alleged adverse act by EDD from our consideration of those acts supported by competent evidence.

11. "Supervisor Valentine violates [Whaley's] privacy rights by disclosing [Whaley's] medical situation to other employees." As support for that alleged act, Whaley cites an excerpt from his response to EDD's special interrogatories in which he stated: "Valentine discloses my medical situation to other employees." However, that

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[17] Although Whaley's alleged adverse act #9 does not include any reference to his assertion those acts were "retaliation," we nevertheless conclude any assertion of retaliation would be conclusory and would not contain sufficient facts on which to conclude Whaley had personal knowledge of the reason(s) for those acts by Davidson and Samaniego. Therefore, we do not consider that aspect of Whaley's interrogatory response.

interrogatory statement does not show Whaley had firsthand or other personal knowledge of the alleged incident during which Valentine purportedly disclosed Whaley's "medical situation" to other employees. It does not show Whaley was present during that purported disclosure or identify which employees received that information. Because Whaley's alleged adverse act #11 is vague, lacks a sufficient foundation, appears to be based on hearsay, and is not supported by competent evidence, we exclude that alleged adverse act by EDD from our consideration of those acts supported by competent evidence.

12. "Supervisor Valentine refuses to approve payment to [Whaley] for time off to which he was entitled and solicits derogatory information on [Whaley] from his [coworker]." As support for that alleged act, Whaley cites excerpts from his response to EDD's special interrogatories in which he stated: "Valentine approaches her subordinate peer and my [coworker] Serrato[,] requesting derogatory information about me; [¶] . . . [¶] Valentine says EDD won't pay me for the time I was forced off because I have not provided another medical leave slip (even though last one was readable and Kaiser was willing to verify it through the proper channels, to protect my privacy); [¶] Valentine/Hallahan refused to pay me for time forced off state premises due to the attack and hostile work environment." Whaley's interrogatory statements support a reasonable inference that he had personal knowledge of Valentine's refusal to approve payment for Whaley's time off. However, they do not support Whaley's assertion in alleged adverse act #12 that he was "entitled" to that payment, which assertion is conclusory and lacks statements do not show Whaley was present during that purported solicitation. Therefore, Whaley's allegation regarding that purported solicitation appears to be based on hearsay and unsupported by competent evidence. Accordingly, we consider Whaley's alleged adverse act #12 only to the extent of its allegation that Valentine did not

approve payment for Whaley's time off and exclude from our consideration the remainder of its allegations.

13. "Supervisor Hallahan instructs [Whaley's] immediate Supervisor, Novick, to keep a secret file on him." As support for that alleged act, Whaley cites an excerpt from his response to EDD's special interrogatories in which he stated: "Hallahan instructs Novick to keep secret or private files on me." However, that interrogatory statement does not show Whaley had first-hand or other personal knowledge of the alleged incident during which Hallahan purportedly instructed Novick to keep secret or private files on Whaley. It does not show Whaley was present during that purported disclosure. Because Whaley's alleged adverse act #13 lacks a sufficient foundation, appears to be based on hearsay, and is not supported by competent evidence, we exclude that alleged adverse act by EDD from our consideration of those acts supported by competent evidence.

14. "Supervisor Hallahan fraudulently prepares a memo of a conversation with [Whaley] prior to the conversation actually occurring." As support for that alleged act, Whaley cites an excerpt from the transcript of his deposition, a blank exhibit divider page, and an excerpt from his responses to EDD's special interrogatories. However, only the latter citation to his interrogatory responses contains any reference to the purported memorandum. In that response, Whaley states: "Hallahan requests Novick sign letter memorandum of conversation days before conversation actually commenced; [¶] Hallahan mischaracterizes me and events in letter-memorandum of conversation days before conversation actually commenced with her." However, that interrogatory statement does not show Whaley had first-hand or other personal knowledge of the alleged incident during which Hallahan purportedly requested Novick sign a letter or memorandum of a conversation before that conversation

actually occurred. It does not show Whaley was present during that purported request of Novick or that Whaley had any first-hand knowledge of that memorandum's content. Because Whaley's alleged adverse act #14 lacks a sufficient foundation, appears to be based on hearsay, and is not supported by competent evidence, we exclude that alleged adverse act by EDD from our consideration of those acts supported by competent evidence.

15. "Supervisor Wendell suggests in writing that Supervisor Torres destroy documents in [Whaley's] personnel file." As support for that alleged act, Whaley cites an excerpt from his response to EDD's special interrogatories in which he stated: "Wendell suggests in writing for Torres to destroy documents in my personnel file after I filed a discrimination complaint and complained of retaliatory suspension." However, that interrogatory statement does not show Whaley had first-hand or other personal knowledge of the alleged incident during which Wendell purportedly suggested in writing to Torres that he destroy documents in Whaley's personnel file. It does not show Whaley was present during that purported suggestion or otherwise had first-hand knowledge of the contents of the purported writing suggesting to Torres that he take that action. Because Whaley's alleged adverse act #15 lacks a sufficient foundation, appears to be based on hearsay, and is not supported by competent evidence, we exclude that alleged adverse act by EDD from our consideration of those acts supported by competent evidence.

16. "Supervisor Samaniego calls [Whaley] a 'peon' in front of [Whaley's coworkers]." As support for that alleged act, Whaley cites an excerpt from the transcript of his deposition and an excerpt from his responses to EDD's special interrogatories. During his deposition, Whaley testified that Samaniego, in the presence of Castillo and other employees, greeted him by saying, "Good morning, peon." In his interrogatory response, Whaley stated: "Samaniego calls me a peon with Castillo there and other

employees around." Based on that interrogatory response and Whaley's deposition testimony, it appears Whaley had personal knowledge regarding the circumstances of that alleged incident. Furthermore, EDD's respondent's brief does not challenge the evidence offered in support of that alleged incident. Accordingly, we consider that alleged adverse act together with other alleged acts supported by competent evidence.

17. "EEO refuses to investigate discrimination complaints of [Whaley] on two separate occasions." As support for that alleged act, Whaley cites an excerpt from his response to EDD's special interrogatories in which he stated: "EEO refuses to investigate discrimination matter twice." However, that response is vague as to the specific act alleged by Whaley, lacks a sufficient foundation, and is conclusory. Because Whaley's alleged adverse act #17 is not supported by competent evidence, we exclude that alleged adverse act by EDD from our consideration of those acts supported by competent evidence.

18. "Supervisor Polak gave [Whaley] an unfavorable Individual Development Plan and refused to discuss it with him." [18] As support for that statement, Whaley cites an excerpt from his responses to EDD's special interrogatories in which he stated: "I received a retaliatory Individual Development Plan from Polak[,] who to this date has not sat down to discuss it with me; it also lacks any element that would articulate an individual development plan as the title would imply." Although that evidence shows Whaley apparently had personal knowledge of an individual development plan (which we assume is a type of job performance evaluation or plan) and Polak's refusal to discuss it with him, Whaley's assertion that it was "unfavorable" was vague and conclusory and is

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[18] That alleged act appears to be the same as the act referenced in alleged adverse act #5, discussed above.

unsupported by any other statement or evidence showing it was unfavorable or specifically describing it. Accordingly, we exclude that alleged adverse act by EDD from our consideration of those acts supported by competent evidence.

19. "Supervisors Hallahan and Davidson tampering with [Whaley's] personnel files by removing table of contents and other documents allowed in file by previous supervisor." As support for that alleged act, Whaley cites an excerpt from the transcript of his deposition and an excerpt from his responses to EDD's special interrogatories. However, the deposition excerpt does not specifically refer to those supervisors or the specific acts in alleged act #19. Regarding the excerpt from Whaley's interrogatory responses, we refrain from quoting the entire excerpt and simply conclude, based on our reading of that excerpt, that it does not show Whaley had any first-hand or personal knowledge of the alleged adverse act(s). Because Whaley's alleged adverse act #19 lacks a sufficient foundation, appears to be based on hearsay, and is not supported by competent evidence, we exclude that alleged adverse act by EDD from our consideration of those acts supported by competent evidence.

20. "Supervisor Hallahan interfering with [Whaley] representing other employees as job steward." As support for that alleged act, Whaley cites an excerpt from his responses to EDD's special interrogatories in which he states: "Hallahan and others interfering with my representing other employees as job steward because I prevailed in and in the process of recovering in Discrimination complaint." That statement is vague, conclusory, and lacks specificity regarding what act(s) Hallahan purportedly did and whether Whaley had first-hand knowledge of those acts. Because Whaley's alleged adverse act #20 is not supported by competent evidence, we exclude that alleged adverse

act by EDD from our consideration of those acts supported by competent evidence.

21. "Supervisors Hallahan and Davidson and/or Polak refusing to convert [Whaley] to full time for 4-6 months after the ruling to do so by the [SPB]." As support for that alleged act, Whaley cites an excerpt from his responses to EDD's special interrogatories, in which he states: "Hallahan/Davidson/Polak then refused to convert me to full time for 4-6 months after the ruling by SPB." Based on that interrogatory response, it appears Whaley had personal knowledge regarding the circumstances of that alleged, albeit vague, act in delaying EDD's compliance with the SPB order. Accordingly, we consider that alleged adverse act together with other alleged acts supported by competent evidence.

22. "Falsely being accused of insubordination and dishonesty by Supervisor Wendell." As support for that alleged act, Whaley cites excerpts from the transcript of his deposition and an excerpt from his responses to EDD's special interrogatories. Based on our review of the deposition excerpts, it appears Whaley testified at his deposition that Wendell wrote two memoranda (in September and October 2005) in which he (Wendell) apparently stated Whaley was dishonest, discourteous, and insubordinate and then placed the memoranda on Whaley's desk. In Whaley's interrogatory response, he stated: "Hallahan/Wendell wrongfully accuse me of [i]nsubordination, [d]ishonesty, [d]iscourteous[ness] due to my prevailing in a discrimination complaint[,] filing Whistle blower complaint, and responding to the retaliatory IDP." Based on that deposition testimony and interrogatory response, it appears Whaley had personal knowledge regarding the circumstances of the alleged, albeit vague, acts of Wendell in stating that Whaley was insubordinate, dishonest and discourteous. However, because the supporting evidence contains no foundational or specific

facts or other explanation supporting Whaley's characterization of those statements by Wendell as being wrong or false, we exclude the adjective "wrongfully" from Whaley's alleged adverse act #22 as being vague and conclusory. Accordingly, we consider that alleged adverse act together with other alleged acts supported by competent evidence, except for its vague and conclusory use of the adjective "wrongfully."

23. "Unjustified denial of FMLA and premature expiration of FMLA term." As support for that alleged adverse act, Whaley cites a page from the SPB decision and an excerpt from his responses to EDD's special interrogatories. However, the page from the SPB decision contains no reference to any FMLA (Family Medical Leave Act, 29 U.S.C. § 2614) issue.[19] In Whaley's interrogatory response, he stated:

> "FMLA retaliation to include premature expirations and denials during period of time I prevailed in, and I am trying to make myself whole with respect to discrimination complaint; [¶] FMLA paperwork appeared altered; pay delayed due to my having a health condition, also to correct prior retaliatory behavior; [¶] My group health care insurance was interfered with during this period of time by Davidson/Espinosa and others."

However, that statement is vague, conclusory, and lacks specificity regarding what act(s) Davidson, Espinosa or others actually did. Furthermore, the supporting evidence contains no foundational or specific facts or other explanation supporting Whaley's characterization of that denial of FMLA as being "unjustified." Because Whaley's alleged adverse act #23 is not supported by competent evidence, we exclude that alleged adverse act by EDD from our consideration of those acts supported by competent evidence.

24. "Supervisor Wendell inappropriately putting his hands on [Whaley]." As support for that alleged adverse act, Whaley cites a page from the transcript of his deposition testimony. In that testimony, Whaley described a meeting during which Wendell purportedly "first puts his arm around me on me, and then on other occasions in that same interaction, he was slapping me in the chest with the back of his hand like this (indicating) and he was . . . and I can tell you that he was not patting me, and I can tell you . . . those physical interactions were unwelcome . . . ." Because Whaley had firsthand knowledge of the alleged adverse, albeit vague, act, we consider that alleged adverse act together with other alleged acts supported by competent evidence, although its characterization of the Wendell's touching as "inappropriate" remains somewhat vague and conclusory.

25 through 28. Regarding alleged adverse acts #25 through #28, because Whaley cites as their sole support evidence the trial court properly excluded in sustaining EDD's evidentiary objections as discussed in part II, *ante*, we refrain from quoting each alleged adverse act and simply conclude that all of those alleged acts are not supported by competent evidence.[20] Accordingly, we exclude those alleged adverse acts by EDD from our consideration of those acts supported by competent evidence.

29. Regarding alleged adverse act #29, because Whaley omits any citation to supporting evidence, we refrain from quoting that alleged adverse act. Because alleged act #29 is not supported by competent evidence, we exclude that alleged adverse act by EDD from our consideration of those acts supported by competent evidence.

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[20] Specifically, each of Whaley's alleged adverse acts #25 through #28 cites certain excerpts from paragraph 10 of Novick's declaration, all of which the trial court properly excluded in sustaining EDD's evidentiary objections.

D

After excluding from our consideration those alleged adverse acts for which Whaley did not provide sufficient supporting competent evidence, we review, individually and collectively, those alleged adverse acts for which he provided sufficient supporting evidence in determining whether EDD took any adverse employment action against him within the meaning of the FEHA and *Yanowitz*. Based on our discussion above, we consider all, or parts of, nine (of 29) alleged adverse acts for which Whaley provided sufficient competent supporting evidence (i.e., Whaley's alleged adverse acts #1, #4, #8 (part), #9 (part), #12 (part), #16, #21, #22 (part), and #24). Considering the totality of the circumstances of those alleged adverse acts, we conclude they do *not* constitute adverse employment action by EDD within the meaning of the FEHA and *Yanowitz*.

As *Yanowitz* explained, and as Whaley concedes, an employer's acts cannot constitute adverse employment action unless they, collectively, *materially* affect the terms, conditions, or privileges of its employee's employment. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1052.) Applying an independent standard of review, we conclude EDD's alleged acts were *not* "reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Id.* at p. 1054.) Alternatively stated, those acts, whether considered individually or collectively, were *not* "*reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion.*" (*Id.* at pp. 1054-1055, italics added.) Rather, EDD's alleged acts should be considered "[m]*inor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee.*" (*Id.* at p. 1054, italics added.) As *Yanowitz* stated: "[A] mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) [discrimination] (or give rise to a [retaliation] claim under section 12940(h))." (*Yanowitz, supra,* at p. 1054, fn. omitted.)

We briefly summarize and discuss Whaley's nine alleged adverse acts supported by competent evidence. Many of those alleged acts appear, individually and collectively, to be minor and/or trivial acts, including the cancellation of overtime Whaley might have worked on a particular day (alleged adverse act #1), a supervisor bumping Whaley while reprimanding him (alleged adverse act #9), a supervisor calling him a "peon" (alleged adverse act #16), short delay of few months after the SPB decision in converting his position to a full-time position (alleged adverse act #21), and a supervisor's purported inappropriate touching of him (alleged adverse act #24).[21] Some of the other alleged acts, as stated by Whaley, are so vague and/or seemingly innocuous that, absent his presentation of further specific facts, they cannot be considered to be other than those types of events or acts that normally occur in the workplace and did not *materially* affect the terms, conditions, or privileges of Whaley's employment, including his suspension around the time his position was converted to a full-time position (alleged adverse act #8), a supervisor's refusal to approve payment for Whaley's time off (alleged adverse act #12), and a supervisor's statement that Whaley had been insubordinate and dishonest (alleged adverse act #22). Finally, as to the remaining alleged act (alleged adverse act #4), Whaley's failure to obtain a promotion to a computer specialist (or back up) position, absent presentation of further specific facts showing he was qualified for and wrongfully denied that promotion, cannot be considered, in the circumstances of this case, to be an act that *materially* affected the terms, conditions, or privileges of Whaley's employment. Considering Whaley's nine alleged adverse acts by EDD, both individually and collectively, we conclude those acts did not materially affect the terms, conditions or privileges of Whaley's employment, and therefore did not constitute adverse employment action within the meaning of the FEHA and *Yanowitz*.[22] Accordingly, after independently reviewing those nine alleged adverse acts by EDD, we conclude the trial court correctly found Whaley had not shown any adverse employment action by EDD in his opposition to EDD's motion for summary judgment. Because EDD carried its burden to show Whaley could not establish the second element of a FEHA retaliation cause of action and Whaley did not carry his burden to make a prima facie showing that there is a triable issue on that element, the court properly granted EDD's motion for summary judgment.[23] (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at p. 849.)

---

[21] Furthermore, regarding alleged adverse act #21, although EDD delayed the conversion of Whaley's position by a few months, EDD paid him all back pay, including interest and benefits.

IV

Award of Costs

Whaley contends the trial court abused its discretion in awarding EDD costs. He asserts the court should not have awarded EDD the costs of videotaping depositions and the costs of his unnecessarily long deposition. The cost of EDD's videotaping depositions apparently was $5,814.35 of the $15,772.77 total cost of taking Whaley's and others' depositions. In awarding EDD all of the costs of taking Whaley's deposition, the trial court stated: "[Whaley] has not shown the requested deposition costs of $15,772,77 were unreasonable or unnecessary. . . .Recovery of such costs and the costs of videotaping the depositions . . . are specifically allowed for under [Code of Civil Procedure section 1033.5, subdivision (a)(3)], which provides that expenses for 'taking, videotaping, and transcribing necessary depositions' are allowable as costs. Whaley provides no support for his argument that videotaping some of these depositions was unreasonable or unnecessary. . . . The length of [Whaley's] deposition (over a six-day period) was necessitated by the large number of adverse employment actions (over 80) [Whaley] claimed were directed at him. This required a lengthy deposition to address all of the allegations." Accordingly, the court awarded EDD all of its deposition costs, including the cost of videotaping, and other costs, for a total award of $16,451.27.

---

[22] The facts in *Yanowitz* and *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441 are inapposite to the facts in this case and do not persuade us to conclude otherwise.

[23] Accordingly, we need not address Whaley's alternative contention that the trial court erred by concluding his cause of action for unlawful retaliation also failed because he did not rebut EDD's showing of legitimate, non-retaliatory reasons for its actions.

We conclude the trial court did not abuse its discretion in awarding EDD costs. As the court noted, Code of Civil Procedure section 1033.5, subdivision (a)(3) expressly provides that allowable costs include: "Taking, *videotaping*, and transcribing necessary depositions . . . ." (Italics added.) In the circumstances of this case, we conclude the court did not abuse its discretion by finding EDD's videotaping of depositions was necessary and therefore recoverable as costs. (*Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1557.)

We further conclude the court did not abuse its discretion by rejecting Whaley's argument that his deposition was unduly long or protracted. Considering

Whaley's causes of action and the multitude of adverse employment acts he alleged, the court could reasonably conclude the length of Whaley's deposition was reasonable. Accordingly, we conclude the trial court did not abuse its discretion in awarding costs to EDD.

DISPOSITION

The judgment is affirmed. EDD is entitled to costs on appeal.

____________________s/s
McDONALD, J.

WE CONCUR:

____________________s/s
HALLER, Acting P. J.

____________________s/s
IRION, J.

APPENDIX B

SAN DIEGO SUPERIOR COURT, RULINGS FOR CASE GIC850412

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

GARY S. WHALEY,	) GIC 850412
	) ~~[Proposed]~~
Plaintiff,	) Judgement
	)
v.	) Action Filed:
	) July 11, 2005
STATE OF CALIFORNIA	)
	) Assigned for All
EMPLOYMENT DEVELOPMENT	) Purposes to
DEPARTMENT,	) Hon. Kevin A
	) Enright
AND DOES 1	) Dept: 72
THROUGH 10, INCLUSIVE	)
	) Trial Date:
Defendants.	) Not Applicable

On July 18, 2006, this court issued a Minute Order granting the Defendant's Motion for Summary Judgment as to all of plantiff's causes of action.

Therefore, IT IS ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff Gary S. Whaley shall recover nothing from Defendant State of California, Employment Development Department. Judgment is hereby entered in favor of the Employment Development Department and against Plaintiff Gary S. Whaley.

2. Defendant Employment Development Department shall recover from Plaintiff Gary S. Whaley allowable costs of suit in the sum of $16,451.27.

Dated: 08-01-06

____________________________s/s
Hon. Kevin A. Enright
Judge of the Superior Court

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

GARY S. WHALEY,) GIC 850412
) **NOTICE OF ENTRY**
Plaintiff,) **ORDER GRANTING**
) **MOTION FOR**
) **SUMMARY**
) **JUDGMENT**
v.) Action Filed:
) July 11, 2005
STATE OF CALIFORNIA)
) Assigned for All
EMPLOYMENT DEVELOPMENT) Purposes to
DEPARTMENT,) Hon. Kevin A
) Enright
AND DOES 1) Dept: 72
THROUGH 10, INCLUSIVE)
) Trial Date:
Defendants.) Not Applicable

TO PLAINTIFF GARY S. WHALEY AND HIS COUNSEL OF RECORD:

PLEASE TAKE NOTE THAT on or about July 18,2006, the Court entered an Order granting defendants' Motion for Summary Judgment, thereby disposing of the entire complaint and all causes of action. A true and correct copy of that Order, titled "MINUTE ORDER ON SUBMITTED MATTER," is attached hereto as Exhibit A.

Dated; July 19, 2006 Respectfully Submitted,

BILL LOCKYER
Attorney General of the
State of California
JACOB A. APPELSMITH
Senior Assistant Attorney
General
CHRIS A. KNUDSEN
Supervising Deputy
Attorney General

________________________s/s
THEODORE S. DRCAR
Deputy Attorney General
Attorneys for Defendant
Employment Development
Department

Exhibit "A"

SUPERIOR COURT OF CALIFORNIA
County of San Diego

Date: July 18, 2006 Dept 72

Reporter A: Not reported
CSR#
Reporter B:
CSR#

Present Hon. Kevin A. Enright
Judge

Clerk: Robin Smith
Bailiff:----------------

Reporters address:
P.O. Box 120128 San
Diego, CA 92112 – 4104

GIC 850412 GARY S. WHALEY,
Plaintiff

vs.

STATE OF CALIFORNIA,
EMPLOYMENT DEVELOPMENT DEPARTMENT
Defendant

MINUTE ORDER ON SUBMITTED MATTER DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY SUMMARY ADJUDICATION OF ISSUES

Following oral argument on 6/16/06, the Court took the matter under submission. After reviewing the papers and arguments of counsel, the Court confirms its 6/16/06. Tentative ruling as the ruling of the court with the following modifications.

The Court sustains defendant, the state of California Employment Development Department's (EDD) evidentiary objections to portions of the declarations of Richard Novak as follows: 2:12-15 (lack of foundation as to how he has any personal knowledge of the State Personnel Board decision. Further, his recitation of what he believes the State Personnel Board's decision states is hearsay as it is an out-of-court statement offered for its truth); 2:16-18 (lack of foundation as to how he has any personal knowledge of the State Personnel Board decision, or why he, as a former employee of EDD, and would be competent to testify on the State Personnel Board's decision. Further, his recitation of what he believes the State Personnel Board's decision states is hearsay as it is an out-of-court statement offered for its truth; 2:20-3:2 (lack of foundation as to how he has any knowledge of any alleged ill will against Mr. Whaley by any of the named supervisors. He was not Mr. Whaley's supervisor at the time Mr. Whaley was allegedly retaliated against. Further, his impression other supervisors had ill will toward Mr. Whaley is conclusary. He states no facts which would show he has a basis for believing any of the named supervisors had ill will toward Mr. Whaley. See **Guthrey v. State of California** (1998) 63 Cal. App.4th 1108, 1119-1120. Additionally, because there is no explanation for how Mr. Novick came to his subjective impression, his conclusion is also an improper lay opinion. (Evidence code section 800). Lastly, Mr. Novick's feeling certain supervisors bore Mr. Whaley ill will is irrelevant. The issue in racial discrimination or retaliation cases is not whether a supervisor liked an employee but whether an adverse employment action was motivated by racial or retaliatory animus; 3:3-4:18 (lack of foundation is to how he has any personal knowledge of the fourteen (14) alleged retaliatory actions. Also his opinion regarding alleged retaliatory animus is simply his subjective conclusion without any showing he has knowledge of any facts supporting such a conclusion. It is also improper lay opinion, because the courts cannot determine it is rationally based on the witness' perception and is helpful to a clear understanding of his or her testimony. A lay witness may testify in the form of an opinion only when he or she cannot adequately describe his or her observations without using opinion wording. Employment discrimination cases have held inadmissible a witness' opinion as to whether an actor was motivated by an impermissible racial animus. **Hester v. BIC Corp.** 225 F.3d 178, 184-186; **Alexis v. McDonald's Restaurants,** 67 F.3d 341, 347; 4:19-5:12 (these alleged ten (10) additional retaliatory acts are "based on information and belief" and are thus insufficient to raise a triable issue of fact. **Lopez v. Univ. Partners** (1997) 54 Cal. App.4th 1117, 1124; CCP 437 c(d). There is no showing Mr. Novak had personal knowledge of the facts); 5:14-18 (this allegation is conclusary, lacks any evidentiary facts in support thereof. Mr. Novick does not identify what complaint of discrimination he is speaking about, nor does his declaration state when any of the alleged acts took place. As set forth in EDD separate statement, these acts took place at different times over a period of approximately four (4) years); 5:19-6:5 (this is legal conclusion unsupported by evidentiary facts. Objections to conclusary declarations are properly sustained where there are no facts supporting the conclusion. **Hoover v. Community Hotel Develop Corp. v. Thompson** 167 Cal. App.3d 1130, 1136-1137.)

The court also sustains the objections to portions of the declaration of Peter Briggs, Ph.D. as follows: 2:5-9 (his opinion Mr. Whaley's emotional distress was caused by "retaliation against him" is inadmissible as improper expert opinion testimony. (Note: at the Depo one month earlier, Dr. Briggs indicated he did not believe he would be giving any opinion on whether or not Mr. Whaley was retaliated against. See lodgment of Depo excerpts in support of D.'s evidentiary objections at 148:16-22). An expert cannot provide opinion on the question of law such as whether Mr. Whaley was retaliated against. **Kotla v. Regents** 115 Cal. App.3d. 283, 291-294); 2:10-18 (Dr. Briggs conclusion Mr.

Whaley suffered retaliatory experiences and his listing of same is improper opinion testimony in this opinion is lacking in fact supporting how he came to this understanding. In his Depo Dr. Briggs admitted he relies entirely on what he heard from Mr. Whaley (see Lodgment of Depo Excerpts in Support of Evidentiary Objections, Briggs Depo at 54:4-14). Dr. Briggs first began treating Mr. Whaley on 1/19/06, he never spoke to Mr. Whaley's supervisors or other medical providers, who treated Mr. Whaley, never reviewed any documents and never administered in testing. It appears all Dr. Briggs is doing is adopting Mr. Whaley's subjective beliefs as his opinion. See **Viterbro v. Chemical Co**. (5th Circ. 1987) 826 F. 2d 420, 424. An expert's opinion, which does not provide foundation for why the expert concluded as he did, cannot assist the trier or a fact. **Jennings v. Palomar Pomerado Health Systems** (2004) 114 Cal. App.4th 1108, 1117-1118. Further, Dr. Briggs opinion about alleged retaliatory acts is inadmissible because it is a legal conclusion that would not assist the trier of fact); 2:19-22 (his opinion there were retaliatory actions in the workplace which created a situation causing stress and anxiety is inadmissible as it is a mere conclusion of law that would not assist the trier of fact. Further, his opinion does not state the reasons for his conclusion or any evidentiary basis. Finally, he provides no evidence he has any particular experience, knowledge or expertise to allow him to opine that retaliation occurred); 3:1-4 (this is an inadmissible conclusion of law which cannot assist the trier of fact, is unsupported by any statement of the basis for the opinion, and Dr. Briggs has not demonstrated he can be qualified as an expert on whether retaliation occurred); Ex. C to the declaration of attorney Joel Golden, and on authenticated document consisting of E-mails dated 9/16/05, 12/7/05, 12/8/05, and attached reports) re Mr. Whaley (lacks foundation, is not properly authenticated); Ex. D to the declaration of attorney Joel Golden, an unauthenticated document consisting of an E-mail dated

5/27/05 by Mr. Whaley (lacks foundation, is improperly authenticated, it is hearsay and that it is an out-of-court statement which purports to state Mr. Whaley's version of a meeting); Ex. E to the declaration of attorney Joel Golden, an unauthenticated document consisting of E-mails dated 4/15/05, 4/27/05, and 9/13/05 from Phil Wendell, Ann Hallahan, and Pat Winslow- Prouty, (lacks foundation, is improperly authenticated, and is irrelevant. They reference supervisors getting advice from someone in the Employee Assistance Program, on how to deal with a difficult employee. They do not tend to support any claim of retaliation or racial discrimination or to show any retaliatory animus against Mr. Whaley, but rather seem to show concern that Mr. Whaley's actions may be the result of mental illness); Ex. F to the declaration of attorney Joel Golden, an unauthenticated document consisting of E-mails dated 6/18/05, 9/8/05, and 9/16/05 from Espi Espinoza (lacks foundation, is improperly authenticated, and here relevant as they indicate only dislike due to Mr. Whaley being a complainer. Dislike is not the equivalent of discriminatory animus.

Defendant Department of Employment Development's motion for summary judgment is granted. The racial discrimination c/a (re treatment and impact of the 2002 language requirement in response to the conversion plan) have already been determined, or could have been determined, by the State Personnel Board decision in 2002. These causes of action are barred by the failure to appeal and exhaust administrative remedies through appeal of the SPB decision to the Superior Court. Those two (2) c/a are also barred by applicable statutes of limitation and the doctrine of collateral estoppel.

The 3rd c/a for unlawful retaliation fails as a matter of law. First, the plaintiff has not shown any action by the defendant that rises to the level of an adverse employment action. Even if the court determines the plaintiff has shown such an adverse employment action, the defendant has demonstrated by admissible evidence legitimate, non-retaliatory reasons for its actions. P has not presented in admissible evidence to raise a material issue of pretext by the Defendant.

The alternative Motion for Summary Adjudication of issues is moot.

IT IS SO ORDERED.

Dated: July 18, 2006

Kevin A. Enright
Judge of the Superior Court

San Diego Superior Court, Ruling for Case GIC850412

The following is a TENTATIVE ruling for 6/16/2006, Department 72, the Honorable Kevin A. Enright presiding.

Case Number GIC850412

The Court sustains Defendant The State of California Employment Development Department's (EDD) evidentiary objections to portions of the declarations of Richard Novick (2:12-15;2:16-18;2:20-3:2; 4:3-18;4:19-5:12;5:14-18;5:19-6:5; and 6:6-10); Peter Briggs PhD (2:5-9;2:10-18;2:19-22;3:1-4); Ex. C to the declaration of Attorney Joel Golden, an unauthenticated document (E-mail dated 9/16/05, 12/7/05, 12/8/05, and attached reports) re Mr. Whaley; Ex. D to the declaration of Attorney Joel Golden, an unauthenticated document (E-mail dated 5/27/05) by Mr. Whaley; Ex. E to the declaration of Attorney Joel Golden, an unauthenticated document (E-mail dated 4/15/05, 4/27/05, and 9/13/05) by Mr. Whaley; Ex. F to the declaration of Attorney Joel Golden, an unauthenticated document (E-mail dated 8/15,8/16/05, and 8/19/05) by Mr. Whaley; Ex. G to the declaration of Attorney Joel Golden, an unauthenticated document (E-mail dated 6/18/05, 9/8/05, and 9/16/05) by Mr. Whaley. The declarations of Mr. Novick and Dr. Briggs lack foundation, personal knowledge, are inadmissible hearsay, and/or constitute improper expert opinion on an issue of law. Ex. C-G lack foundation, are not properly authenticated, are irrelevant to retaliatory animus or pretext, and/or are inadmissible hearsay. Defendant Department of Employment Development's Motion for Summary Judgment is granted. The racial discrimination c/a (re treatment and impact of the 2002 language requirement in response to the conversion plan) have already been determined, or could have been determined, by the State Personnel Board decision in 2002. Thus these causes of action are barred by the failure to exhaust administrative remedies by appeal of the SPB decision to the Superior Court. Those two (2) c/a are also barred by applicable statutes of limitation and the doctrine of collateral estoppel. The 3rd c/a for unlawful retaliation fails as a matter of law. First, the Plaintiff has not shown any action by the Defendant that rises to the level of an adverse employment action. Even if the Court determines the Plaintiff has shown such an adverse employment action, the Defendants have demonstrated by admissible evidence a legitimate, non-retaliatory reason for the action. P has not presented any admissible evidence to raise a material issue of pretext by the Defendant. The alternative Motion for Summary Adjudication of Issues is moot.

Oral Argument Policy

This ruling is a tentative ruling pursuant to California Rule of Court 324. Unless modified or vacated by oral argument, the tentative ruling will become the final order of the Court. [See
California Rule of Court 324] Parties appearing for oral argument must appear on the date and at the time noticed for the hearing. Failure to appear will be deemed waiver of oral argument. Unless otherwise ordered, no further order is to be prepared after the hearing. The prevailing party is to prepare and serve notice of this ruling pursuant to CCP Section 1019.5.

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San Diego Superior Court, Ruling for Case GIC850412

APPENDIX C

CALIFORNIA STATE PERSONNEL BOARD ADMINISTRATIVE HEARING

STATE PERSONNEL BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the)
Complaint by:) SPB Case No. 03-1420A
)
GARY S. WHALEY) **BOARD DECISION**
)
of discrimination based)
on race in the position of) January 11, 2005
Employment Program)
Representative at Chula)
Vista Unemployment)
Insurance Call Center)
Employment Development)
Department in San Diego)

APPEARANCES: Gary S. Whaley, Complainant, in proper; Glenn C. Jones, Senior Staff Counsel, Employment Development Department, on behalf of respondent, Employment Development Department.

BEFORE: William Elkins, President; Vice President Maeley Tom; Sean Harrigan, Ron Alvarado and Anne Sheehan, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after Gary S. Whaley (complainant) filed a complaint of unlawful discrimination under Government Code § 19702 claiming that the Employment Development Department (EDD or respondent) unlawfully refused to convert him from a permanent intermittent (PI) Employment Program Representative (EPR) to a full-time

EPR based on his race and ethnicity. After a thorough review of the record in this matter, the Board finds that complainant has proven that he was unlawfully discriminated against on the basis of his race under a disparate impact theory. As such, the Board hereby orders that complainant be appointed to a full-time EPR status and be awarded appropriate back pay and benefits.

Employment History

Complainant was appointed as a PI EPR with EDD on November 8, 2000. Since his appointment, he has continuously worked as a PI EPR at EDD's Chula Vista Call Center.

Factual Background

On September 16, 2002, EDD and the California State Employees Association (CSEA), entered into an agreement for a one-time conversion of eligible PI EPRs to fulltime status for a total of up to a cap of fifty percent of

---

[1] 2 California Code of Regulations, Section 277 provides, in relevant part, as follows:

(a) Increases in time base of part-time or intermittent employees to full time or movement of intermittent employees to part time are permitted when:

(1) The employee has previously held a permanent or probationary status appointment at or above the desired time base in the classification to which the appointment is to be made or in the classification that is substantially at or above the salary level of that classification; or,

(2) The appointing power can clearly demonstrate that the employee has previously been eligible for an appointment from an employment list to the position and time base in question; or,

(3) For at least two years the employee has held any combination of permanent or probationary appointments to the types of classes specified in Subsection (1) and has worked at least 1920 hours in such appointments."

The agreement provides, in part, that "[a]ll employees being converted under this Agreement must be eligible for conversion through meeting the requirements of SPB Rule 277[1], or be immediately reachable on the full-time employment list to the same classification they have permanent civil service status." The agreement also provides that "[e]mployees must meet all requirements for the position including but not limited to language fluency." Assuming the employee met all requirements, the conversions would occur based upon the employee's time based seniority.

According to EDD, 76 positions in its Unemployment Insurance Division were identified for conversion. All positions were slated for various EDD Call Centers throughout the State, with 12 of those positions identified for the Chula Vista Call Center. Out of the 12 positions available for conversion at the Chula Vista Call Center, EDD established a Spanish fluency requirement for six of those positions and a Tagalog[2] fluency requirement for the other six positions. Jesus

Vasquez, EDD's Division Chief, approved the language-fluency requirement for the 12 positions at the Chula Vista Call Center. Vasquez testified that the language requirement for the Chula Vista Call Center was established *after EDD had identified that it had six Spanish and six Tagalog speaking PI EPRs at that location.* He further testified that "[o]nce we identified what the languages were, other than English, and we felt that these were languages that would assist the enterprise, we made that part of a requirement that this would be the requirement to bring these people on board, and that would be the fluency part of it.[3]

---

[2] Tagalog is defined in Random House Webster's College Dictionary as "1. A member of a people of the Philippines, living mainly in central and SW Luzon. 2. The Austronesian language of the Tagalogs."

[3] Transcript from December 4, 2003 hearing, p. 63, lines 1-5.

Mr. Vasquez explained his rationale as follows:

> The point being, number one is that these individuals will add to the enterprise. The Spanish is a language that is underrepresented, and this was not an excessive number for the language. Tagalog was an opportunity for us to have these individuals, if they were already working in our system, to continue that fluency for us in that language. There is no particular group that these calls get routed to, but we do have various requests that come in for interpreting and so forth, and this represented an opportunity for us.[4]

On October 23, 2002, complainant submitted a Preference Form to EDD listing his seniority ranking and identifying four full-time EPR positions for his conversion request. The first position was a Spanish-fluency position at the Chula Vista Call Center, the second position was a Tagalog-fluency position at the Chula Vista Call Center, the third position was at the San Diego Primary Adjudication Center and did not have a language requirement, and the fourth position was also in the San Diego Primary Adjudication Center, but had a Spanish-fluency requirement. EDD did not convert complainant. EDD's representative testified that complainant was not converted to positions in the Chula Vista and San Diego locations because, in part, complainant did not possess the necessary language skills for those positions. There is no dispute that complainant met SPB Rule 277's criteria and had sufficient seniority for at least two of the four positions subject to conversion. Complainant, who is a Caucasian male, however, was not converted to full-time status solely because he did not possess fluency in either Spanish or Tagalog. Complainant contends that EDD's failure to convert him amounted to unlawful discrimination on the basis of race and ethnicity.

---

[4] Transcript from December 4, 2003 hearing, p. 63, lines 23-28, and p. 64, lines 1-4.

Procedural Background

On April 13, 2003, complainant submitted a letter to EDD's Equal Employment Opportunity Office asserting that the language fluency requirement for the 12 EPR positions in the Chula Vista Call Center operated to exclude any monolingual, primary English-speaking PI employees from consideration for the conversion. EDD's Equal Employment Opportunity Office responded on May 5, 2003, declining to investigate complainant's claim on the basis that he failed to allege discrimination on the basis of a protected class.

On May 12, 2003, complainant filed his discrimination complaint with the SPB. On August 12, 2003, complainant submitted a letter to the SPB further clarifying that his claim is based on the assertion that he was unfairly discriminated against because he is white.

ISSUES

The following issues are before the Board:

1. Did appellant establish a *prima facie* case of discrimination by a preponderance of the evidence by showing that: (i) he applied and was qualified for a full-time position; (ii) he was denied a full-time position, despite his qualifications; and (iii) other employees who were less qualified were appointed because they were either of Hispanic or Filipino descent?
2. If appellant established a *prima facie* case, did EDD establish that it had a legitimate,

nondiscriminatory business need to fill the full-time positions with employees who were fluent in either Spanish or Tagalog;

3. If EDD met this burden of production, did appellant show that EDD's proffered reason was not its true reason, but, instead, a pretext for illegal discrimination?

4. If appellant proved that EDD engaged in illegal discrimination, did appellant show that he would have been appointed to a full-time position but for that discrimination?

DISCUSSION

Unlawful Discrimination

California Government Code § 19702(a), which regulates state civil service, states, in relevant part, "[a] person shall not be discriminated against under this part because of sex, race, religious creed, color, national origin, ancestry, marital status, physical disability, or mental disability." The California Fair Employment & Housing Act (FEHA) as codified under Government Code § 12940 *et seq.* states, in relevant part, "[i]t shall be an unlawful employment practice, unless based upon a *bona fide occupational qualification,* ... (a) [f]or an employer,-because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, ... or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

When reviewing discrimination complaints, the Board looks to Title VII of the Civil Rights Act of 1964

(Title VII), FEHA, and court decisions interpreting Title VII and/or FEHA for guidance.[5] In this regard, it is important to note that the Board will look to the laws that provide the broadest civil rights and anti-discrimination protection for state workers in analyzing Section 19702 claims.[6] In the context of an unlawful denial of employment opportunity, a complainant may prove that the denial of employment opportunity was based on unlawful discrimination under a disparate treatment theory and/or a disparate impact theory.[7] In this case, complainant presents a disparate impact claim.

Employment discrimination claims under the disparate impact theory are based on the notion that an employment policy or practice that is adopted without a deliberately discriminatory motive may, in operation, result in discrimination against individuals in a protected group.[8] In other words, a facially neutral employment policy or practice that has a disparate impact on certain employees because of their membership in a protected group would run afoul of the anti-discriminatory objectives of Title VII and FEHA.

In order to establish a prima facie case of discrimination based on disparate impact, a complainant must identify a specific employment practice or policy that causes a significant discriminatory impact on members of a protected group. While traditionally, disparate 'impact cases involved standardized tests or criteria wholly devoid

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[5] Marie Rose Johnson (2002) SPB Dec. No. 02-08, p. 5. It is noted that the public policy objectives of Title VII and FEHA are identical and California courts have often turned to federal Title VII authority to interpret analogous provisions of FEHA. (Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317,354; Price v. Civil Service Com. (1980) 26 Cal.3d 257, 270-77; County of Alameda v. Fair Employment and Housing Com. (1984) 153 Cal.App.3d 499,504.)

[6] Andrew G. Ingersoll (2000) SPB Dec. No. 00-01, p. 24.

[7] Guz v. Bechtel National. Inc. (2000) 24 Cal.4th 317, 354 & *tn. 20.*

[8] Watson v. Forth Worth Bank and Trust (1988) 487 U.S. 977, 987; Cota v. Tucson Police Department (D. Arizona
1992) 783 F.Supp. 458, 471.

of any subjective or discretionary element, such as aptitude tests or written tests of verbal skills[9],courts have found that disparate impact theory is equally applicable to situations Where the employment practice or policy is based on subjective or discretionary criteria.[10]

In this case, complainant challenges EDD's decision to impose Spanish fluency and Tagalog fluency requirements on the 12 EPR positions available for full time conversion at the Chula Vista Call Center. The evidence clearly establishes that to impose the language requirement was a discretionary decision made by EDD's management. While there is no evidence that the decision to impose the language requirement was necessarily motivated by a discriminatory intent, the impact from such a requirement is to deny most Caucasian employees and other ethnic groups whose primary language is something other than Spanish or Tagalog the conversion opportunity.[11]

While the language requirements for the posted positions did not dissuade complainant from applying, complainant has presented evidence that the requirements dissuaded other Caucasian employees, who were otherwise eligible, from submitting an application. It is unknown how many other employees belonging to different ethnic groups whose primary language is neither Spanish nor Tagalog were dissuaded from applying for the conversion at the Chula Vista Call Center. Clearly, the language requirements caused some members of some ethnic groups to be excluded from consideration. Accordingly, it is concluded that complainant has established his *prima facie* case of discriminatory impact.

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[9] Griggs v. Duke Power Company (1971) 401 U.S. 424; Watson v. Forth Worth Bank and Trust, supra, 487 U.S. at 988; Carter v. CB Richard Ellis. Inc. (2004) 122Cal.App.4th 1313,1322-23, & *tn. 2.*

[10] Watson v. Forth Worth Bank and Trust, supra, 487 U.S. at 991; Carter v. CB Richard Ellis, Inc., supra, 122 Cal.App.4lh at 1323. &fn 2.

[11] Respondent asserted at the hearing and in its brief to the Board that complainant, as a white male, does not belong to a cognizable racial minority and therefore is not a member of a protected class. Respondent's assertion is simply incorrect and is counterintuitive to the purpose of anti-discrimination laws. "It is well-established that Title VII applies to any racial group, whether minority or majority. [Citation.]" (Aragon v. Republic Silver State Disposal, Inc.(91 Cir.2002) 292 F.3d 654, 659.)

The burden then shifts to EDD to demonstrate that the challenged language requirement serves a legitimate business necessity.[12] "To constitute a [business necessity defense], an employment practice with disproportionately adverse impact 'must be shown to be necessary to safe and efficient job performance... .' [Citation.]... the business purpose must be sufficiently compelling to override any [disparate]impact.',[13]

It is undisputed that the language requirement for the 12 positions at the Chula Vista Call Center was imposed *solely* as a means of retaining the PI EPRs who were already working at the Chula Vista Call Center and who were fluent in Spanish and Tagalog.[14] Indeed, EDD did not present any tangible or statistical evidence of a preexisting business need for Spanish or Tagalog speaking EPRs. The only explanation offered for the requirement is

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[13] Johnson Controls. Inc. v. Fair Employment & Housing Com., supra, 218 Cal.App.3d at 541.

[14] Arguably, a case can be made that the language requirement also constituted disparate *treatment* against nonHispanic or non-Filipino PI EPRs. In the equal protection context, some federal courts have equated language as a proxy for race or ethnicity. (Hernandez v. New York (1991) 500 U.S. 352, 371-372; Olaques v. Russoniello (9th Cir.1986) 797 F.2d 1511, 1520-21, vacated as moot by U.S. Supreme Court in Russoniello v. Olaques (1987) 484 U.S. 806.) To the extent that language operated in this case as a proxy for race, EDD's action arguably amounted to granting preferential treatment to individuals of certain races and/or ethnicities in the operation of public employment. This violates Article I, Section 31 of the California Constitution (Proposition 209). (See Kidd v. State of California (1988) 62 Cal.App.4th 386.)

Mr. Vasquez's *after-the-fact* personal observation that "Spanish is a language that is underrepresented" and that this was an opportunity to increase or capture Tagalog speaking individuals. Such an explanation falls far short of a legitimate business necessity. To this end, EDD has failed to rebut complainant's *prima facie* case of unlawful employment discrimination.

Remedy

Government Code § 19702(f)(1) sets forth the remedy available to a complainant in an unlawful discrimination claim brought before the SPB. This section provides, in relevant part, that the Board may order the appointing authority "to take any action, including, but not limited to, hiring, reinstatement, or upgrading of employees, with or without back pay, and compensatory damages, which, in the judgment of the board, will effectuate the purposes of this part." Additionally, it is noted that "effective remedies under FEHA should be fashioned so as to make the individual whole. [Citation]."[15] "The Legislature's intent was to give public employees the same tools in the battle against employment discrimination that are available to private employees. The FEHA was meant to supplement, not supplant or be supplanted by existing anti-discrimination remedies, *in order to give employees the maximum opportunity to vindicate their civil rights against discrimination....,,*[16] Based on the facts of the case, we conclude that, to make complainant whole from the denial of his request for conversion to full-time status, EDD must appoint complainant forthwith, to a permanent full-time EPR position. Moreover, complainant is entitled to back pay in an amount representing the difference between what he would have earned as a permanent full-time EPR if he were duly converted at the same time as the other PI EPRs at the Chula Vista Call Center, and the amount he actually earned since that date, less any appropriate offsets.

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[15] Cloud v. Casey (1999) 76 Cal.App.4th 895, 906.

[16] Schifando v. City of Los Angeles (2003) 31 Cal.4th 1074,10-85-86.

CONCLUSION

The Board finds that complainant has proven, by a preponderance of the evidence, that he had sufficient seniority to have been converted from a PI EPR to a full-time EPR and that he was denied the conversion solely based on the language requirement for those positions. The Board finds that the language requirement operated to dissuade otherwise qualified non-Hispanic and non-Filipino employees from applying for the positions and from consideration. The Board further finds that EDD failed to establish a legitimate business necessity for the language requirements. Accordingly, the Board concludes that EDD's language requirement resulted in unlawful discrimination against complainant on the basis of his race and ethnicity. The Board hereby finds that the appropriate remedy is for EDD to appoint complainant to a full-time EPR position, forthwith, and to award him back pay, interests, and benefits allowed by law.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. EDD immediately appoint complainant to a full-time EPR position either in its Chula Vista Call Center or San Diego Primary Adjudication Center;
2. Complainant be paid all back pay, interests, and benefits allowed by law, including, but not limited to, the difference between what he would have earned as a permanent full-time EPR if he were duly converted at the same time as the other PI EPRs at the Chula Vista Call Center and the amount he

actually earned since that date;

3. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due complainant.

STATE PERSONNEL BOARD

William Elkins, President
Maeley Tom, Vice President
Sean Harrigan, Member
Ron Alvarado, Member
Ann Sheehan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 11, 2005.

____________________s/s
Floyd Shimomura
Executive Officer
State Personnel Board

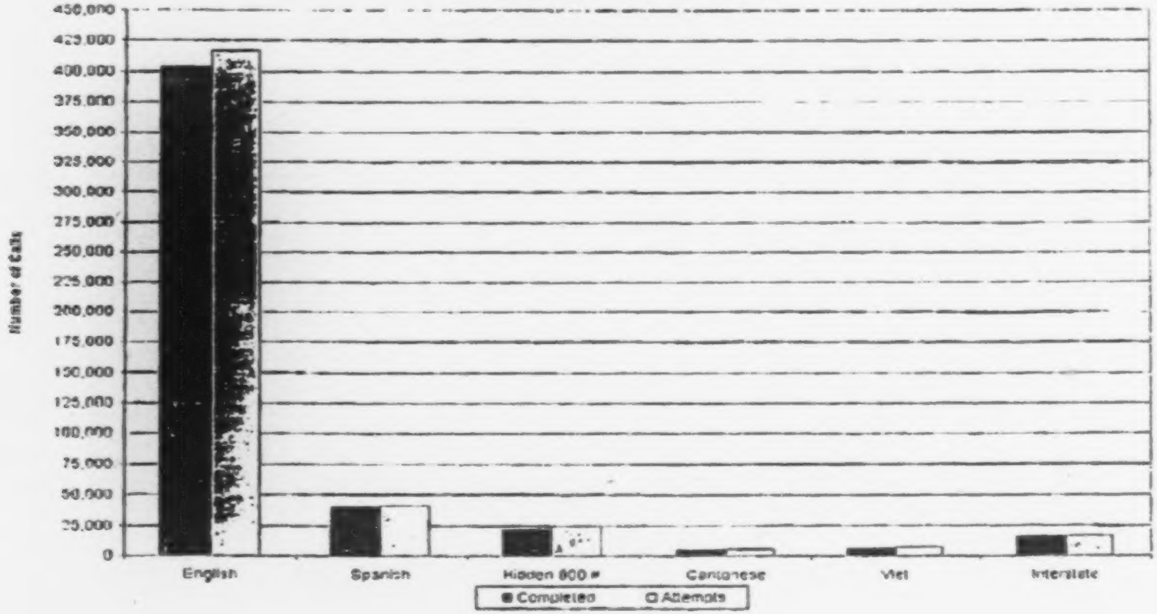
[Whaley.dec]

I. NETWORK INFORMATION

- ***INFORMATION IN THIS SECTION REFLECTS THE NUMBER OF CUSTOMERS STATEWIDE THAT ATTEMPTED TO REACH THE CALL CENTERS THROUGH THE 800 NUMBERS DURING THE WEEK.***

- Week ending July 7, 2001: 486,338, over 95% of the 511,196 call attempts to the call centers came in on the published toll free 800 numbers.

Network Attempts and Completed Calls
Week Ending July 7, 2001

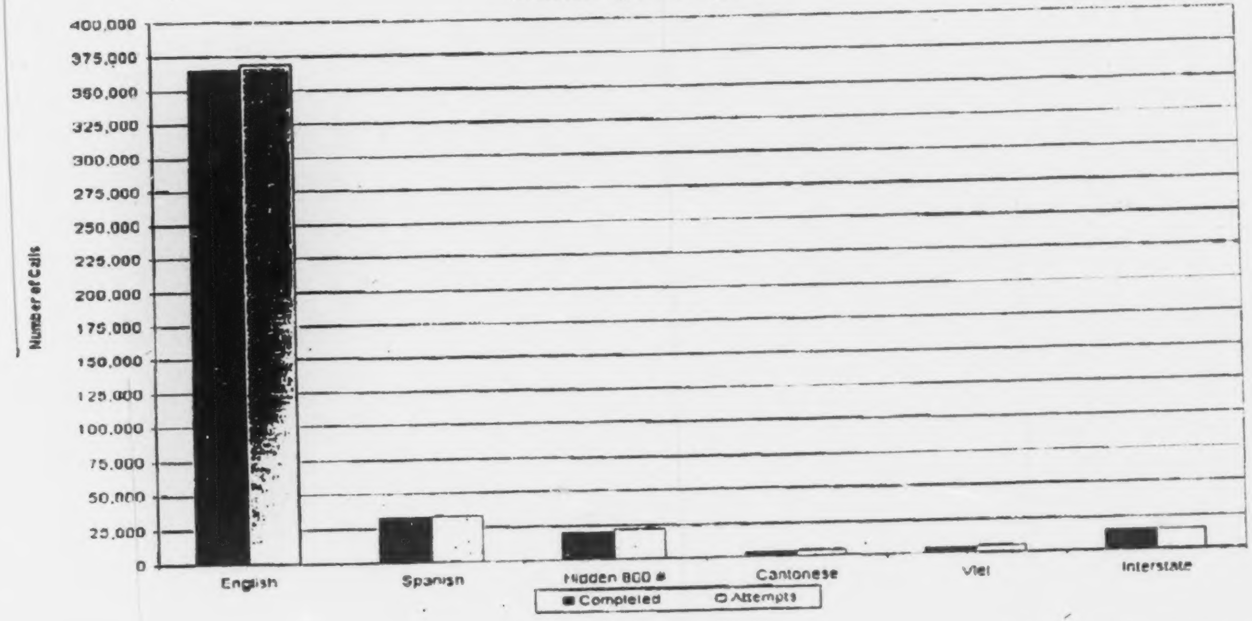


I. NETWORK INFORMATION

- ***INFORMATION IN THIS SECTION REFLECTS THE NUMBER OF CUSTOMERS STATEWIDE THAT ATTEMPTED TO REACH THE CALL CENTERS THROUGH THE 800 NUMBERS DURING THE WEEK.***

- Week ending June 30, 2001: 427,892, only 95% of the 450,411 call attempts to the call centers came in on the published toll free 800 numbers

Network Attempts and Completed Calls
Week Ending June 30, 2001



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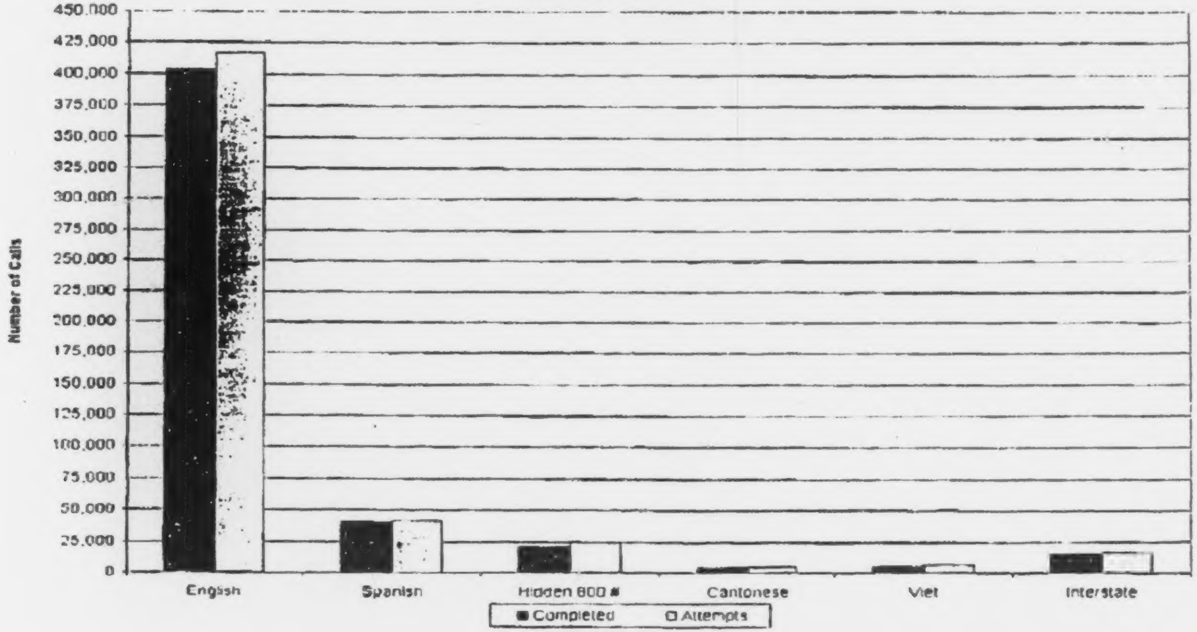
Network Attempts and Completed Calls
Week Ending July 7, 2001

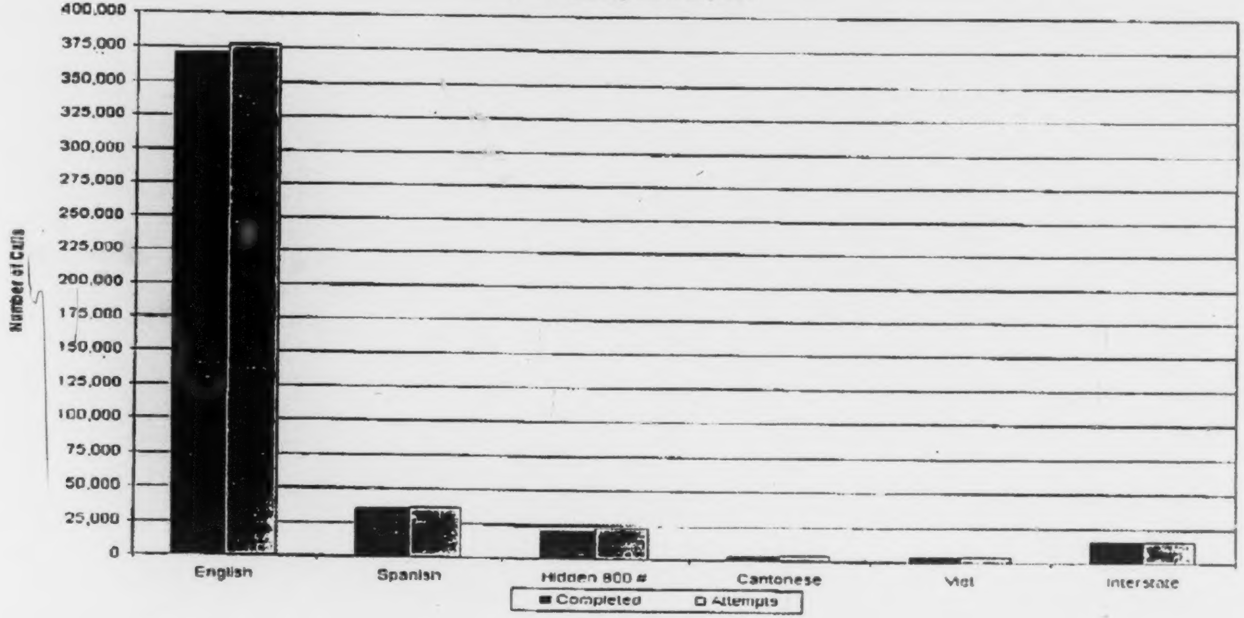


I. NETWORK INFORMATION

- ***INFORMATION IN THIS SECTION REFLECTS THE NUMBER OF CUSTOMERS STATEWIDE THAT ATTEMPTED TO REACH THE CALL CENTERS THROUGH THE 800 NUMBERS DURING THE WEEK.***

- Week ending June 23, 2001: 438,536 or over 95% of the 461,269 call attempts to the call centers came in on the published toll free 800 numbers.

Network Attempts and Completed Calls
Week Ending June 23, 2001

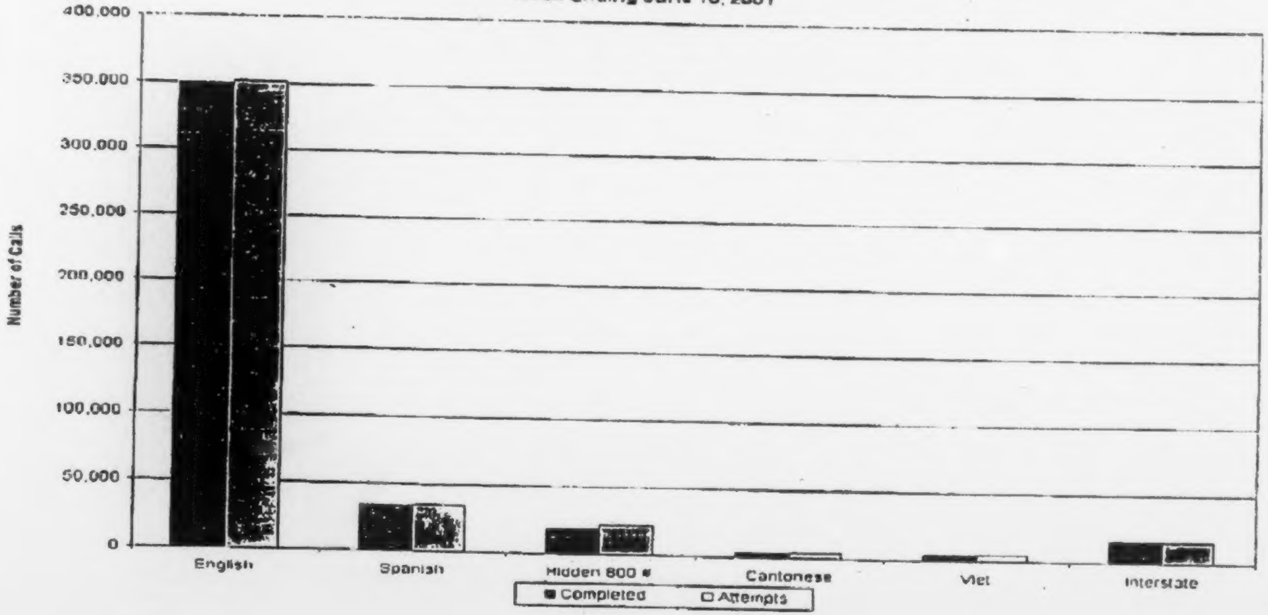


I. NETWORK INFORMATION

- ***INFORMATION IN THIS SECTION REFLECTS THE NUMBER OF CUSTOMERS STATEWIDE THAT ATTEMPTED TO REACH THE CALL CENTERS THROUGH THE 800 NUMBERS DURING THE WEEK.***

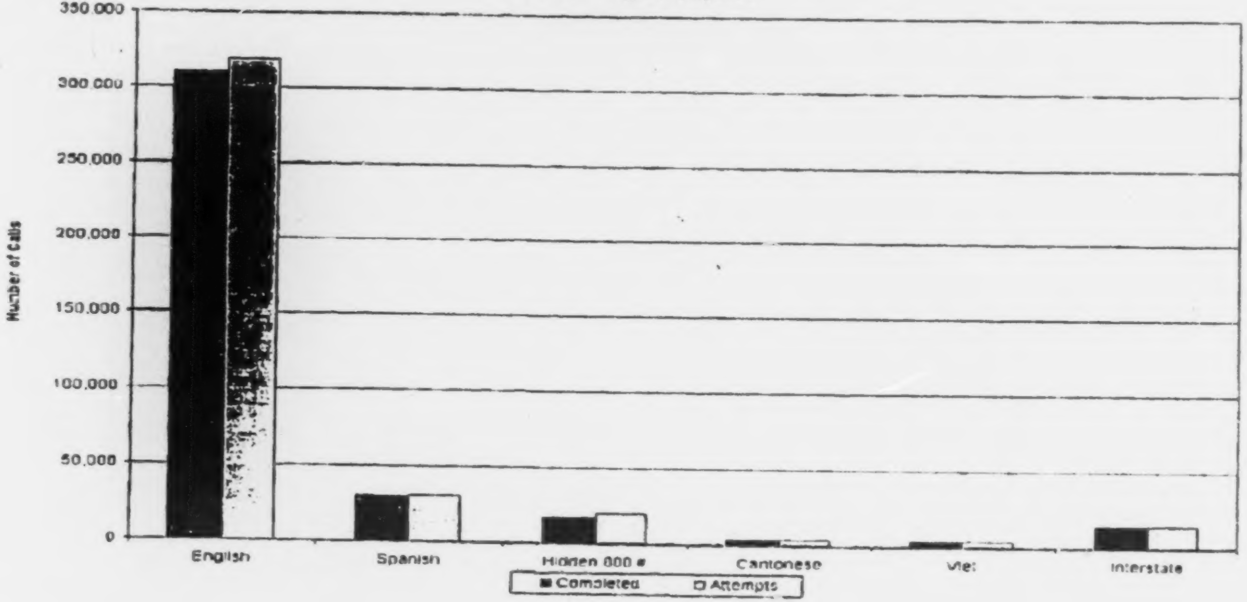
- Week ending June 16, 2001: 411,182 or almost 95% of the 433,183 call attempts to the call centers came in on the published toll free 800 numbers.

Network Attempts and Completed Calls
Week Ending June 16, 2001



I. NETWORK INFORMATION

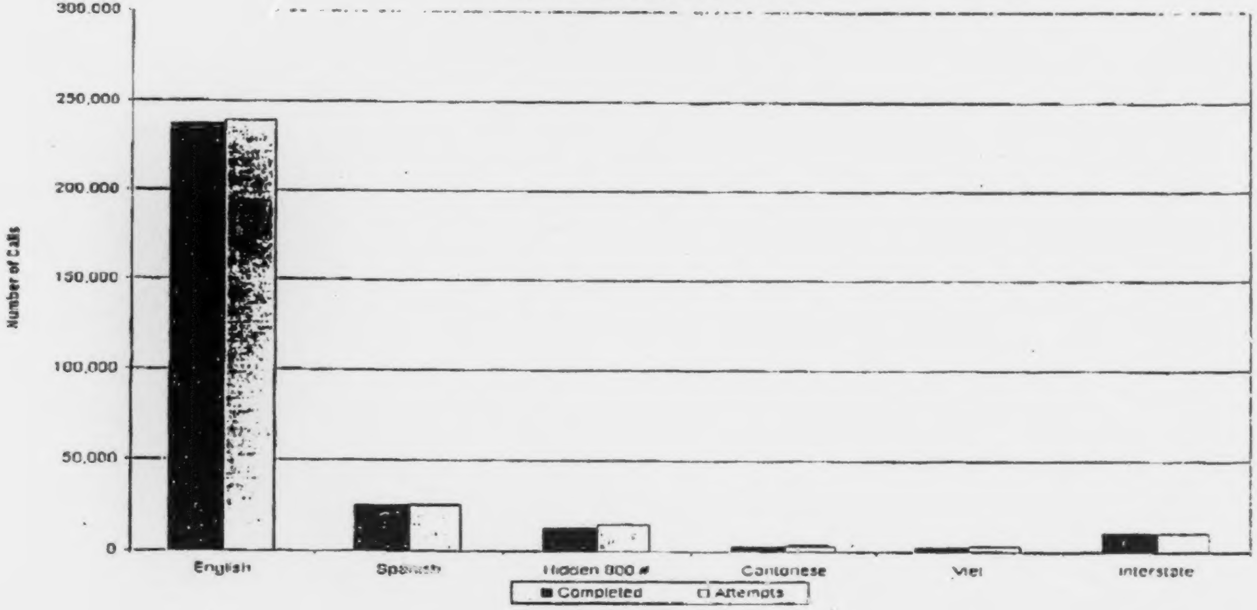
- ***INFORMATION IN THIS SECTION REFLECTS THE NUMBER OF CUSTOMERS STATEWIDE THAT ATTEMPTED TO REACH THE CALL CENTERS THROUGH THE 800 NUMBERS DURING THE WEEK.***
- Week ending June 9, 2001: 372,531 or almost 95% of the 392,278 call attempts to the call centers came in on the published toll free 800 numbers.


Network Attempts and Completed Calls
Week Ending June 9, 2001

I. NETWORK INFORMATION

- ***INFORMATION IN THIS SECTION REFLECTS THE NUMBER OF CUSTOMERS STATEWIDE THAT ATTEMPTED TO REACH THE CALL CENTERS THROUGH THE 800 NUMBERS DURING THE WEEK.***
- Week ending May 26, 2001: 281, 865 or over 95% of the 296,543 call attempts to the call centers came in on the published toll free 800 numbers

Network Attempts and Completed Calls
Week Ending May 26, 2001

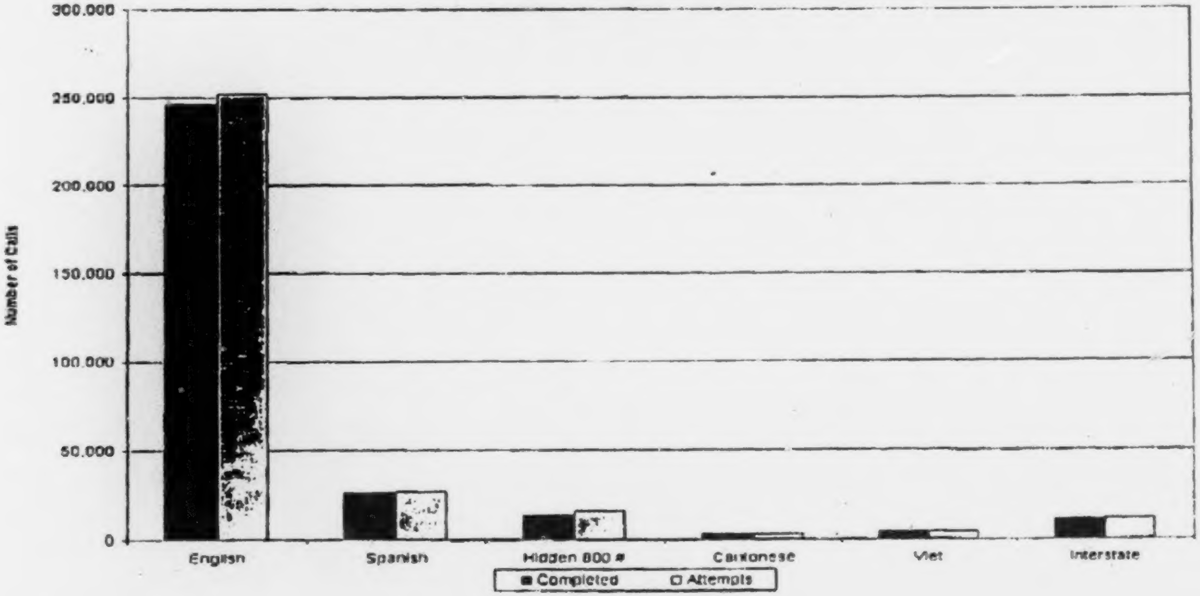


I. NETWORK INFORMATION

- ***INFORMATION IN THIS SECTION REFLECTS THE NUMBER OF CUSTOMERS STATEWIDE THAT ATTEMPTED TO REACH THE CALL CENTERS THROUGH THE 800 NUMBERS DURING THE WEEK.***

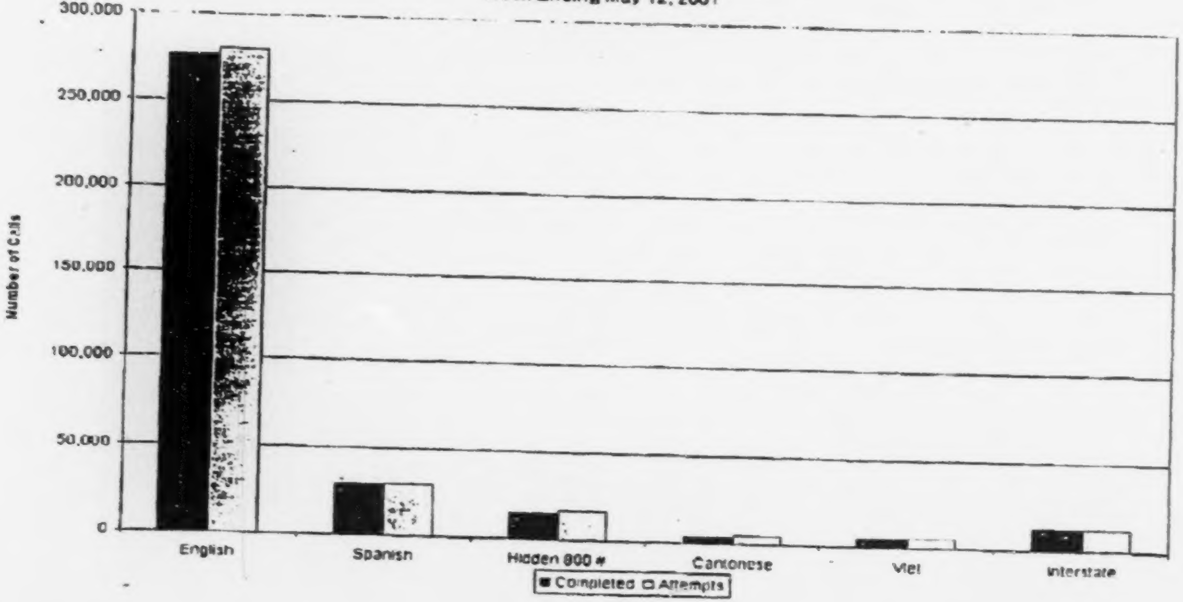
- Week ending May 19, 2001: 298,206 or almost 95% of the 314,320 call attempts to the call centers came in on the published toll free 800 numbers

Network Attempts and Completed Calls
Week Ending May 19, 2001



I. NETWORK INFORMATION

- ***INFORMATION IN THIS SECTION REFLECTS THE NUMBER OF CUSTOMERS STATEWIDE THAT ATTEMPTED TO REACH THE CALL CENTERS THROUGH THE 800 NUMBERS DURING THE WEEK.***
- Week ending May 12, 2001: 333,067 or over 95% of the 350,052 call attempts to the call centers came in on the published toll free 800 numbers.



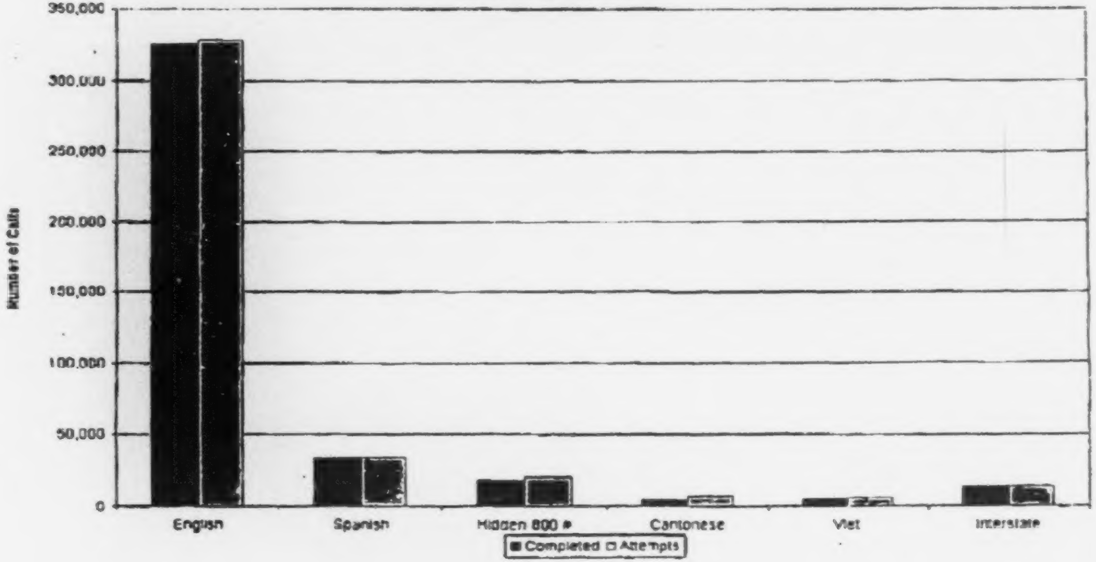
Network Attempts and Completed Calls
Week Ending May 12, 2001

I. NETWORK INFORMATION

- ***INFORMATION IN THIS SECTION REFLECTS THE NUMBER OF CUSTOMERS STATEWIDE THAT ATTEMPTED TO REACH THE CALL CENTERS THROUGH THE 800 NUMBERS DURING THE WEEK.***

- Week ending May 5, 2001: 389,387 or over 95% of the 409,334 call attempts to the call centers came in on the published toll free 800 numbers

Network Attempts and Completed Calls
Week Ending May 5, 2001



APPENDIX D

CALIFORNIA SUPREME COURT PETITION

DENIED REVIEW ON DECEMBER 12, 2007

Court of Appeal, Fourth Appellate
District, Div. 1 – No. D049396

IN THE SUPREME COURT OF CALIFORNIA

En Banc

GARY S. WHALEY, Plaintiff and Appellant

v.

STATE OF CALIFORNIA EMPLOYMENT
DEVELOPMENT DEPARTMENT,
Defendant and Respondent

The petition for review is denied.
The request for an order directing publication of the opinion is denied.

[Date of entry: Dec 12, 2007]

_______________s/s
Deputy C7
Frederick K. Ohlrich Clerk

_______________s/s
George- Chief Justice

APPENDIX E

PETITION FOR FOURTH APPELLATE COURT REHEARING

REHEARING DENIED ON OCTOBER 15, 2007

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

GARY S. WHALEY,	)	D049396
	)	
Plaintiff and Appellant,	)	
	)	
v.	)	(Super. Ct.No.
	)	GIC850412)
STATE OF CALIFORNIA	)	
	)	
EMPLOYMENT DEVELOPMENT	)	
DEPARTMENT,	)	
	)	
Defendant and Respondent.	)	

THE COURT:

The petition for rehearing is denied.

[Date of Entry: October 15, 2007]

____________________s/s
Haller, Acting P.J.

Copies to: All parties